UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE GUARD PUBLISHING COMPANY d/b/a THE REGISTER-GUARD	)	
RESPONDENT,	)	
AND	)	CASE NOS. 36-CA-8743-1
	)	36-CA-8849-1
THE EUGENE NEWSPAPER GUILD LOCAL 194	)	36-CA-8789-1
	)	36-CA-8842-1
CHARGING PARTY.	)	

BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE

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COMES NOW, Respondent, THE GUARD PUBLISHING CO. d/b/a *The Register-Guard* (hereinafter *"The Register-Guard"* or "Company"), pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, (hereinafter "Board"), files its Brief in Support of Respondent's Exceptions to the February 21, 2002 Decision of the Administrative Law Judge John J. McCarrick.

I. PRELIMINARY STATEMENT

This case is about three issues: First, Respondent's attempt to enforce its 1996 Communications System Policy by prohibiting an employee from sending unsolicited e-mail notice of a union rally and campaign on behalf of a third-party organization, the charging party, to Company employees at their Company-provided e-mail addresses; Second, Respondent's attempt

to bargain over its October 2001 proposal to integrate its 1996 Communications System Policy into the text of the parties' collective bargaining agreement; and Third, Respondent's attempt to enforce its long-standing policy prohibiting employees from wearing or displaying controversial insignia while working with the public.

Ninety-nine percent (99%) of Respondent's exceptions and Brief in support thereof deal not with credibility determinations made by the ALJ, but rather address the ALJ's failure to make factual findings and legal conclusions in light of binding case precedent, including Board law and decisions by the United States Supreme Court, as well as unrebutted evidence admitted by the charging party's witnesses, offered by Respondent's witnesses, or both.

The ALJ improperly found that Respondent bore the burden of persuasion that it did not enforce its 1996 Communications System Policy or its insignia policy for the purpose of discriminating against employees on the basis of their union activity, despite a ruling by the United States Supreme Court reaching a diametrically opposed conclusion. The proper distribution of the burden of persuasion set forth by the United States Supreme Court leaves no doubt that Respondent met its burden to offer a legitimate, non-discriminatory reason for enforcing the aforementioned two long-standing policies in conformance with previously unchallenged past practices.

A. ENFORCEMENT OF RESPONDENT'S 1996 COMMUNICATIONS SYSTEM POLICY.

The ALJ failed to apply clear Board law to the unrebutted evidence in this case that the parties bargained over the Company's 1996 Communications System Policy, the Union had unequivocal notice that the Company was enforcing the policy to prohibit Union and other third party organizational use of the Company's e-mail system more than six months before the charge was filed in this case, the charging party neither filed a grievance or an unfair labor practice

charge over said enforcement, and any charges related to the implementation of the Communications System Policy were barred by Section 10(b) of the Act. The ALJ also failed to find that the employer has the right to proscribe third-party organizational non-business use of its equipment, even if it permits individuals to use its equipment for personal, non-business uses. Last, the ALJ failed to apply Board law stating that the Act should not be interpreted to overrule state property laws. The Company's enforcement of the 1996 Communications System Policy was a lawful reaction to a clear trespass to chattels.

B. RESPONDENT'S COUNTERPROPOSAL NO. 26.

Regardless of how the 1996 Communications System Policy was applied in the past, the ALJ wrongly concluded that Respondent's Counterproposal No. 26 could be both a mandatory subject of bargaining and an illegal subject of bargaining, and that the charging party could not bargain away the future right, if any, to use Respondent's communications equipment for union business under certain time/place limitations.

C. ENFORCEMENT OF RESPONDENT'S LONG STANDING INSIGNIA POLICY.

The ALJ failed to apply clear Board law to the unrebutted evidence in this case that the Company had an insignia policy for over 15 years, it enforced that policy more than six months before the charge was filed in this case, the charging party neither filed a grievance or an unfair labor practice charge over said enforcement, and any charges related to the implementation of the insignia policy were barred by Section 10(b) of the Act. The ALJ also failed to find that the Company, under the special circumstance exception to the general rule, has the right to prohibit employees from wearing union insignia and other controversial insignia when working with the public. The ALJ improperly found that the employer has the burden to demonstrate actual harm

had occurred from wearing or displaying union insignia when working with the public before it enforced its insignia policy.

II. STATEMENT OF THE FACTS

A. THE COMPANY'S PROHIBITION ON SPAM FROM THIRD PARTY ORGANIZATIONS.

The unrefuted testimony in the Record shows the following: Between March of 1996 and the summer of 1997, the Company phased in the installation of a $3 million electronic communications system. (Tr. 351, L. 13-25; Tr. 352, L. 1-7; G.C. Ex. 2). At a time when the Union and the Company were negotiating over a new collective bargaining agreement, the Company prepared and disseminated an initial draft of its Communications System Policy to all employees on September 4, 1996. (Tr. 59, L. 1-10, 15-18; Tr. 60, L. 3-6; C.P. Ex. 1). During that same period of time, the Union twice requested to bargain over the use of the electronic communications system. (Tr. 386, L. 15-23; Resp. Exs. 12 & 13).

In fact, the then President of the Union, Tad Shannon, sent a memo on September 12, 1996, to the Company requesting to bargain over the issue, and did in fact bargain over the policy. (Tr. 386, L. 15-23; Tr. 387, L. 2-7; Resp. Ex. 12). On September 17, 2000, the Union sent a second memo stating that it would file a grievance over the policy if the parties did not settle the issue at the bargaining table. (Resp. Exs. 12 & 13). The Union distributed several bargaining bulletins addressing the negotiations over the Company's Communications System Policy after bargaining sessions in 1996, including a later October 4, 1996 bargaining session. (Tr. 388, L. 8-19; Tr. 391, L. 8-22; Resp. Exs. 14 & 15).

As a result of the Company's 1996 bargaining sessions with the Union the parties reached agreement and the Company disseminated a revised version of the policy dated October 3, 1996. (Tr. 63, L. 6-18; Tr. 420, L. 5-16; Tr. 60, L. 3-15; Tr. 61, L. 22-25; Tr. 386, L. 15-20; Tr. 394, L. 5-24; C.P. Ex. 2). The policy, in relevant part, states the following:

General Guidelines:

4. Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of *The Register-Guard*. Communication systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

7. Improper use of Company communications systems will result in discipline, up to and including termination.

(G.C. Exs. 2& 9).

The policy has been in place since that time, (G.C. Ex. 54, p. 1), and the Union never filed a grievance over the Company's 1996 Communications System Policy or any application thereof; nor did the Union file an unfair labor practice charge over the 1996 implementation of the policy. (Tr.63, L. 6-18; Tr. 386, L. 15-25; Tr. 387, L. 1-25; Tr. 388, L. 1-25; Tr. 389, L.1-25; Tr. 390, L. 1-25; Tr. 391, L. 1-25; Tr. 392, L. 1-21; Resp. Exs. 14, 15). In 1997, while Bill Bishop was Union President, Manager C.J. Heaton made it clear to Bishop that the e-mail system should not be used for Union business. (Resp. Ex. 7). The Union filed neither a grievance, nor an unfair labor practice charge over the June 3, 1997 memo given to Mr. Bishop by C.J. Heaton. (Tr. 288, L. 8-9, 12-14).

On May 4, 2000, Suzi Prozanski, Union President, while acting on the Union's behalf, (D. 9, L.8-9), spammed from a Company computer at least 50 Company employees at their Company-provided e-mail addresses. (Tr. 79, L. 3-9; Tr. 83, L. 17-24; Tr. 84, L. 1-3, 12-13; G.C. Ex. 7). Prozanski also posted a copy of the substance of her May 4, 2000 spam on the bulletin boards in the Company's facility, because not all employees have computers. (Tr. 84, L. 20-25; Tr. 85, L. 1-13). On May 5, 2000, the Company immediately warned her that her May 4, 2000 spam violated the Company's Communications System Policy. (Tr. 78, L. 5-20; G.C. Ex. 8).

Prozanski admitted her policy violation in a written memo to Managing Editor Dave Baker. (Resp. Ex. 2).

On August 14 & 18, 2000, Prozanski sent more spam from the Union's office six miles away to Company employees at their Company-provided e-mail addresses. (Tr. 87, L. 4-25; Tr. 88, L. 1-16; G.C. Exs. 5 & 6).

The August 14, 2000 spam read as follows:

> Greetings from the Guild –
>
> Remember to WEAR GREEN on Tuesday. Let's show unity! We all work best when we all work together. A fair contract is long overdue, including fair raises for all of us. We've worked for it. We've earned it. We deserve it!
>
> Yours in solidarity,
>
> Suzi Prozanski
> President, Eugene Newspaper Guild

(G.C. Ex. 5).

The August 18, 2000 spam read as follows:

> Hey, Guardians:
>
> The Guild is planning a fun, entertaining, PRIZE-winning entry in the Eugene Celebration Parade this year. To that end, we're looking for volunteers in two capacities: A makeshift percussion section using newspaper-related "drums," and a simple, funny newspaper drill team.
>
> Our first run-through will be this Monday at 6 p.m., in the parking lot behind PetSmart (just up Chad Drive). Family members can participate, too. Be sure to bring your sense of humor along!
>
> Folks who are interested in participating should contact Karen McCowan, Lisa Hollingsworth or Sandy Raney or just show up on Monday.
>
> Thanks!

Suzi Prozanski,
President, Eugene Newspaper Guild

(G.C. Ex. 6).

On August 21, 2000, the Company sent Prozanski a written warning stating that her August spams violated the Company's 1996 Communications System Policy. (G.C. Ex. 9).

Walden said this in the memo:

> "In the current instance, you apparently used an outside terminal from which to send, but never the less communicated with *Register-Guard* employees from either a Company or Union list, for Guild activities.
>
> In May you acknowledged that your actions were inappropriate and I believe told Dave Baker that you would refrain from using the Company's systems for Union/personal business. We believe this current distribution of messages violates both the spirit and the letter of our communications policy and therefore, ask that you stop using the system for dissemination of Union information."

(G.C. Ex. 9; Tr. 89, L. 1-13).

Because they are sent by or on behalf of an outside organization, unsolicited third-party organizational spams, such as the ones sent on behalf of the Union, (G.C. Exs. 23 & 43), have always been prohibited under the 1996 Communications System Policy. (Tr. 65, L. 12-16; Tr. 66, L. 8-10, 12-23; Tr. 68, L. 19-21; Tr. 394, L. 24-25; Tr. 395, L. 1-20; Tr. 399, L. 23-25; Tr. 400, L. 1-9; Tr. 401, L. 9-20; Tr. 403, L. 8-25; Resp. Exs. 17, 19; G.C. Ex. 4). The Company has enforced its prohibition against unsolicited spamming of its employees by or on behalf of any other outside organization, such as the Red Cross, Amway, Avon, Weight Watchers, or churches. (Tr. 65, L. 12-16; Tr. 66, L. 8-10, 12-23; Tr. 68, L. 19-21; Tr. 394, L. 24-25; Tr. 395, L. 1-20; Tr. 399, L. 23-25; Tr. 400, L. 1-9; Tr. 401, L. 9-20; Tr. 403, L. 8-25; Resp. Exs. 17, 19; G.C. Ex. 4). In fact, the Company sent a standard response to all unsolicited e-mails from outside organizations, including spam, sent to their Company e-mail address, demanding that they refrain

from sending any further spam. (Tr. 65, L. 12-25; Tr. 66, L. 1-19; Tr. 68, L. 1-15; Tr. 394-395; Resp. Ex. 17).

Importantly, the unrefuted evidence in the Record shows that United Way, the only outside organization besides the Union about which any evidence was introduced regarding e-mail, was not permitted to use the Company's computer or e-mail systems to promote its programs by sending unsolicited e-mails using the spamming methods employed by the Union, through Suzi Prozanski; rather, the Company occasionally communicated directly with employees as part of Company-sponsored efforts to support its chosen charity, the United Way. (Tr. 396, L. 7-19; Tr. 404, L. 1-24). There is no evidence in the Record that an outside organization was ever permitted to or did send unsolicited spam to Company employees. The Company communicated to employees about its Weight Watchers-related dietary program through paycheck envelope stuffers, not via e-mail. (Resp. Ex. 19; Tr. 403-405).

The Company has simply not allowed the Union or any other outside organization to use its fax machines, copy machines, or any of its other communication devices since the adoption of the 1996 Company Communications System Policy, which refers to such items. (Tr. 402-403; Tr. 418, L. 21-25; Tr. 419, L. 1-11). Instead, the Company's expired collective bargaining agreement provided for bulletin board use. (Tr. 204, L. 15-25; Resp. Ex. 5). Former Union President Lance Robertson wrote an article in a Union publication, *The Guardian*, in which he stated that bulletin boards are an important tool for communicating with members. (Tr. 211, L. 20-25; Tr. 212, L. 1-9).

The General Counsel's witnesses admitted that the Union had ample channels of communication to the Company's employees it represents:

1. The Union has a monthly print publication called *The Guardian* that it distributes to employees. (Tr. 118).

2. The Union distributes written bargaining bulletins to update its members on collective bargaining issues. (Tr. 119). The Union pays for the printing of these publications and has it done at Kinkos. (Tr. 121).

3. The Company provides the Union with the names and addresses of all the employees so the Union may send them things through the U.S. Mail. (Tr. 125).

4. By agreement with the Company, the Union has Union bulletin boards in all the departments where it represents employees and, in the cafeteria. (Tr. 117-118; Resp. Ex. 3).

5. Personal conversation. (Tr. 76, L. 17-20; Tr. 124, L. 3-25; Tr. 384, L. 18-25; Tr. 204, L. 22-25; Resp. Ex. 5).

6. Displaying pro-Union signs in personal automobiles. (Tr. 239, L. 20).

7. Wearing armbands when not working with the public. (Tr. 240, L. 5-11; Tr. 258, L. 1-25; G.C. Ex. 62).

B. THE COMPANY'S BARGAINING COUNTERPROPOSAL NO. 26.

On October 25, 2000, during collective bargaining negotiations, the Company offered a bargaining proposal that would integrate into the text of the parties' new collective bargaining agreement a proscription against the use of the Company's electronic communications system for any Union business. (Tr. 143, L. 17-25; Tr. 144, L. 1-4; G.C. Ex. 49). The Company offered a

written explanation of the policy on November 15, 2000, to which was attached the Company's 1996 Electronic Communications System Policy. (Tr. 146, L. 1-13; Tr. 147, L. 15-18; G.C. Ex. 50).

The Union filed an unfair labor practice charge regarding Company Counterproposal No. 26, which was dismissed on March 30, 2001. (Tr. 208, L. 1-25; Tr. 209, L. 1-12).

On April 9, 2001, the Union made a written request for clarification of the proposal. (Tr. 206, L. 13-16; G.C. Ex. 52). On April 21, 2001, the Company provided a written response to the Union's questions. (Tr. 206, L. 13-16; G.C. Ex. 53). During April 21, 2001 negotiations, the Union was told that, based on the Union's requests when settling the earlier solicitation/distribution issue, Company Counterproposal No. 26 addressed only what the Union and its unit members, not other employees, could do and not do. (Tr. 207, L. 1-12; Resp. Ex. 3).

It is clear from the language of the settlement agreement, (Resp. Ex. 3), that the Guild wanted the proposal to deal only with what the Guild could or could not do. For example under the heading "Agreements" on page 1 of Respondent Exhibit 3, Agreement 3 deals with solicitation/distribution and states:

> "If the Company implements a policy dealing with solicitation/distribution affecting other than Guild related activities, the Guild agrees that it will not demand to bargain."

And in that same Respondent Exhibit 3 at Agreement 4 on page 1 dealing with bulletin boards it states:

> "The Guild agrees to sign a side letter stating that, should the Company establish a community bulletin board, the Guild will not seek or demand to use that board for Guild business."

The Company told the Union that it was going to be treating the Union like all other outside third party organizations. (Tr. 442, L. 4-13; G.C. Ex. 53). The employer invited

counterproposals from the Union, but none were forthcoming. (Tr. 207, L. 19-25; Tr. 208, L. 1-10). Id. The Union's immediate response to Company Counterproposal No. 26 was to file an unfair labor practice charge.

The Union's position on April 21, 2001 was that it was neither accepting nor rejecting Company Counterproposal No. 26, and that it was not asserting that Company Counterproposal No. 26 was not a mandatory subject of bargaining. (Tr. 210, L. 1-4). At that time, it was the Company's expressed position that Company Counterproposal No. 26 was a mandatory subject of bargaining, (Tr. 211, L.21-25; Tr. 212, L. 1-5), and the Union did not claim that Company Counterproposal No. 26 was a non-mandatory subject of bargaining. (Tr. 213, L. 11-14; Tr. 444).

C. THE COMPANY'S BAN ON WEARING INFLAMMATORY INSIGNIA WHEN MEETING WITH THE PUBLIC ON COMPANY BUSINESS.

For over a decade, (Tr. 376), *The Register-Guard* has had a clear policy prohibiting the wearing of controversial insignias, including union insignias, by employees when they are with the public and/or customers of *The Register-Guard.* (Tr. 356-360) (unrebutted testimony of Advertising Director, Michael Raz); (Tr. 331-334) (testimony of Managing Editor, Dave Baker; Resp. Ex. 10). In fact, when then Managing Editor Jim Godbold issued a 1997 memo restating the Company's ongoing policy prohibiting reporters from wearing Union insignia when they were meeting the public, the Guild filed neither a grievance nor an unfair labor practice charge over the memo. (Resp. Ex. 10; Tr. 334).

Circulation Director Chuck Downing had this to say about that policy:

> Q: Now, does *The Register-Guard* have a policy that you are aware of concerning District Managers wearing insignia of any kind while working?
> A: Yes.
> Q: And what is that policy?
> A: That while in execution of their duties in the field, they are not to wear anything that is not appropriate to the business;

that while out conducting business with the public, which would include carriers, subscribers, and non-subscribers that they are basically there to do the business of the Company as a representative.

Q: Has that policy been in place as long as you have worked at *The Register-Guard*?

A: Yes.

Q: Do you know why the policy exists?

A: Yes. I think it is for a couple of real important reasons. One is that they are our representative. They represent the Company while they are in the field working with the carriers and the public, and so as that it is important for them to put us forth in the best light possible. If they do not do that, it can adversely effect our business.

Ron Kangail, a Circulation Department District Manager who works in the field managing a geographical district for *The Register-Guard*, stated the following on cross-examination:

1. That he was managing District 400 in December 2000. (Tr. 254).

2. That Mr. Kangail, on behalf of *The Register-Guard,* signs contracts with independent contractor newspaper carriers as a "Guard Publishing Company representative." (Tr. 253; Resp. Ex. 6).

3. District 400 had contracts with approximately 60 independent contractors who collectively on a daily basis purchase 2,800 newspapers from *The Register-Guard.* (Tr. 254-255).

4. As a District Manager it was part of his job to do everything reasonably possible to have these carriers sell more subscriptions and therefore earn more money for *The Register-Guard.* (Tr. 255).

5. That as a District Manager, Ron Kangail, on behalf of *The Register-Guard*, terminated contracts with independent contractor newspaper carriers. (Tr. 255).

6. That as a District Manager for District 400, it was part of his job to recruit/find individuals to sign independent contractor agreements to deliver *The Register-Guard* where routes did not have a contracted carrier. (Tr. 255).

7. That as a District Manager it was in his best interest to have all routes filled all the time. (Tr. 255).

8. That as a District Manager it was part of his responsibility to maintain a good *Register-Guard*/carrier relationship with the carriers that were under contract. (Tr. 255-256).

9. That as a District Manager it was part of his job to maintain a good *Register-Guard*/subscriber relationship. (Tr. 256).

10. That one aspect of his job was the responsibility to use his best efforts to run the district in a way to maximize the number of subscribers. (Tr. 256).

11. That he used his personal vehicle when working in District 400 and that *The Register-Guard* reimbursed him for mileage for the use of that vehicle. (Tr. 256).

12. Kangail testified that both carriers and subscribers are the customers of *The Register-Guard.* (Tr. 260).

On or about December 12, 2000, Zone Manager Steve Hunt had a meeting with District Manager Ron Kangail during which Mr. Hunt told Mr. Kangail that when Kangail was in the district working that he should not have in his automobile window a sign concerning the ongoing contract dispute between *The Register-Guard* and the Eugene Newspaper Guild. (Tr. 372). Mr.

Hunt told Mr. Kangail that it was his job to represent the Company; that the District Manager is usually the only person from the Company that a carrier or subscriber will come in contact with; and that he had to represent *The Register-Guard* in a positive way and promote the Company and avoid controversial topics. (Tr. 372).

The unrefuted evidence in the Record shows that Mr. Kangail was free to have the sign in his vehicle window when he was at home, while his car was parked in *The Register-Guard*'s parking lot, or at any other time that he was not working with the public on behalf of *The Register-Guard.* (Tr. 357, L. 14-25; Tr. 358, L. 1; Tr. 368, L. 4-10; Tr. 376, L. 1-6; Tr. 378, L. 18-25; Tr. 379, L. 1-13; Tr. 359, L. 15-23; Tr. 360, L. 3-15). Kangail was just asked merely to refrain from wearing or displaying union insignia when he was in his district doing business. At the time, the Union was running radio commercials to advertise its position, and Mr. Kangail testified that there was nightly news coverage. (Tr. 257). It is clear from Mr. Kangail's testimony that his purpose in wearing a green armband and in displaying the sign on his vehicle was "to show unity of Guild members and it was also to show that we had been without a contract." (Tr. 258). His display and wearing of union insignia was clearly connected to a controversy related to the Union's position in negotiations.[1]

Mr. Kangail testified that he wore the armband in the building and in the lunchroom and that no one tried to stop him. Mr. Kangail swore in a Board Affidavit that Mr. Hunt told him only "to take off the green armband while outside the office on Company business." (Tr. 263-264). Mr. Kangail further admitted that he gave sworn testimony in his NLRB affidavit that stated "When I asked him why I had to do these things he had instructed me to do, Hunt said it was not

[1] Mr. Kangail was an evasive and an incredible witness. While on direct examination he testified at length about his activity on behalf of his Union, he feigned ignorance about the purpose of the green armband and placard once he understood that being truthful about their purpose would undermine the Union's position in this case. (Tr. 258-259). ALJ McCarrick's failure to find Kangail to be an incredible witness represents clear error.

appropriate to wear or have displayed Guild banners while meeting the public." (Tr. 264). Mr. Kangail, an evasive witness, grudgingly acknowledged that there was no reason he could not have displayed the sign in his vehicle in the Company parking lot and that he had seen other cars with the placard in their vehicles in the Company parking lot. (Tr. 265).

III. QUESTIONS INVOLVED

1. Whether the Administrative Law Judge improperly placed the burden of proof on *The Register-Guard* to show that it did not violate the Act by enforcing its 1996 Communications System Policy and its long-standing insignia policy?

   This Question specifically relates to Exceptions 1-10, 100-102.

2. Whether *The Register-Guard's* enforcement of its 1996 Communications System Policy with respect to Suzi Prozanski violated the Act or was merely maintaining the status quo and time-barred under Section 10(b)?

   This Question specifically relates to Exceptions 11-58, 98-99.

3. Whether *The Register-Guard's* consistently enforced its 1996 Communications System Policy?

   This Question specifically relates to Exceptions 11-58, 98.

4. Whether *The Register-Guard* has the right to prohibit the Union and employees acting on its behalf from using *The Register-Guard*'s Communications System - specifically its electronic mail system - for the purposes of solicitation on behalf of the Union, when the Company has prohibited all other outside organization from sending unsolicited e-mail to *The Register-Guard*'s employees at their Company-provided e-mail addresses, but allowed employees to use *The Register-Guard*'s e-mail system to send personal messages?

   This Question specifically relates to Exceptions 11-58.

5. Whether *The Register-Guard*'s enforcement of its long-standing insignia policy with respect to Ron Kangail violated the Act was merely maintaining the status quo and timed-barred under Section 10(b)?

   This Question specifically relates to Exceptions 59-61, 101-102.

6. Whether *The Register-Guard*'s enforcement of its long-standing insignia policy with respect to prohibiting Ron Kangail from wearing/displaying union insignia when working with the public did not violate the Act in accordance with the "special circumstances" exception to prohibiting the wearing or displaying of union insignia?

   This Question specifically relates to Exceptions 62-77, 80-82.

7. Whether *The Register-Guard*'s Counterproposal No. 26 constituted a mandatory subject of bargaining, and therefore could not have constituted an illegal subject of bargaining?

   This Question specifically relates to Exceptions 83-97.

8. Whether *The Register-Guard* violated the Act by failing to withdraw Company Counterproposal No. 26?

   This Question specifically relates to Exceptions 87-97.

9. Whether Administrative Law Judge McCarrick improperly engaged in contract interpretation to determine whether *The Register-Guard*'s enforcement of its insignia policy, with respect to Mr. Kangail's wearing/displaying Union insignia while representing *The Register-Guard* in public violated the Act?

   This Question specifically relates to Exceptions 78-79.

10. Whether Administrative Law Judge McCarrick improperly engaged in contract interpretation to determine that *The Register-Guard's* enforcement of its 1996 Communications System Policy with respect to Union solicitations in 2001, violated the Act?

    This Question specifically relates to Exception 60.

IV. ARGUMENT

A. ALJ McCarrick Improperly Placed the Burden of Proof on Respondent. Respondent Met its Actual Burden of Production, Which the General Counsel Failed to Rebut By a Preponderance of the Evidence.

The Burden of Proof always rests with the General Counsel. The Board law upon which ALJ McCarrick relied for the contrary proposition that Respondent carried the burden of proof that it enforced its 1996 Communications System Policy and its decade-old controversial insignia policy in the instances at issue in this case, for legitimate, non-discriminatory reasons, Western Plant, 322 NLRB 183, 194 (1996); Bertrand Dupont, Inc., 271 NLRB 443 (1984), directly conflicts with the binding precedent set by the United States Supreme Court in Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwhich Collieries, 114 S.Ct. 2251 (1994), in which the Court declared invalid, in relevant part, the Court's previous ruling in NLRB v. Transportation Management Corp., 462 U.S. 393, 404, 103 S.Ct. 2469 (1983); *See* N. L.R.B. v. Wright Line , 662 F.2d 889, 905,, n. 9 (1st Cir. 1981) (finding that the Board mislabels the employer's burden as an "affirmative defense." As an employer has only the burden of production, and it need not overcome the charging party's prima facie case by a preponderance of the evidence, but only some evidence worth credence – a "good" reason for the action).

Therefore, ALJ McCarrick judged the facts related to the Respondent's enforcement of its long-standing policies under the wrong standard of law. Respondent, by introducing the unrebutted testimony and documentary evidence outlined below, met its actual burden of showing a legitimate reason for its enforcement decisions – the Company was attempting to continue to equally enforce a long-standing policy prohibiting unsolicited use of its communications system by outside organizations. The Court of Appeals in Wright Line , 662 F.2d 889, 908-09, stated that when an employer introduces evidence of a prior consistent employment action in light of a

violation of work seen treated as significant by the employer, there would normally be no finding of a violation of the Act. Here, the unrebutted evidence in the Record shows that the Company treated similar unsolicited organizational e-mail the same way, regardless of the content of the e-mail or the identity of the outside organization.

Thus, ALJ McCarrick's decision must be reversed with respect to his conclusions that Respondent violated 8(a)(1) and (3) of the Act by enforcing its 1996 Communications System Policy and its insignia policy.

1. The Company's enforcement of its 1996 Communications System Policy merely maintained the status quo.

As found by Chairman Hurtgen and the Board, "well-established" principles governing Section 10(b)'s application states that a complaint is barred where the operative events establishing the violation occurred more than six (6) months prior to the filing of an unfair labor practice charge. Northern Engraving Corp., 337 NLRB No. 6, *2 (slip opinion)(December 2001). The six (6) month period began to run when the dispute raised was "clearly drawn." Id.

In Northern Engraving Corp., the Company continued to withhold employees union dues after they resigned from the union, but the employees waited seven (7) months to file an unfair labor practice charge. The Board found that their claims were barred by Section 10(b), because the employees had clear, unequivocal notice that their check-off revocations had not been accepted.

Similarly, before and after May 5, 2000, *The Register-Guard* regularly enforced its bargained over 1996 Communications System Policy to inform outside organizations that the Company prohibited such organization from sending unsolicited mass e-mail ("spam") to the Company's employees' Company-provided e-mail accounts. The Board must apply its normal rules and find that the Company's May and August 2000 warnings to Suzi Prozanski did not

violate the Act, but merely represented a consistent ongoing enforcement of the Company's 1996 Communications System Policy.

At the insistence of the charging party, the 1996 Communications System Policy was bargained over before implementation six years ago, and it had been in effect for four years prior to the time the first unfair labor practice was filed related to the policy. By memo to Human Resources Director, Cynthia Walden, dated September 12, 1996, the President of the Union stated:

> "This is to formally reassert our right to bargain with the Company over the proposed Company Communications System Policy, because it constitutes a change in working conditions... as we have previously stated, it is our desire to reach an amicable agreement with the Company over this issue. **Please contact us to schedule bargaining over the proposed policy.** If we do not hear from you, it is our intent to institute formal grievance procedures. Our preference remains for settlement short of such procedures." (emphasis added).

(Resp. Ex. 12).

By memo dated September 17, 1996, the Union President filed a written grievance because the Company had allegedly not responded to the September 12, 1996 memo referenced above. In the September 17, 1996 grievance the Union stated:

> "In our earlier letter, we reasserted our right to bargain with the Company over the proposed policy because it constitutes a change in working conditions. **As you know, the Taft Hartley Act requires an employer to bargain in good faith on mandatory subjects that fall within the category of wages, hours and other terms and conditions of employment...** As we stated in our September 12 letter, we would prefer to resolve these issues at the bargaining table." (emphasis added).

(Resp. Ex. 13).

After receiving the September 17, 1996 grievance, the Company and the Union met and reached agreement on the policy that was distributed October 4, 1996. (G.C. Ex. 2; Tr. 63, L. 6-

18; Tr. 386, L. 15-23; Tr. 387, L. 2-7; Tr. 420, L. 5-16). The matter was thereby resolved, and the Company's Communications System Policy was put into effect in writing in October 1996. (G.C. Ex. 2; Tr. 351, L. 13-25; Tr. 352, L. 1-7). The Union did not file a grievance or any unfair labor practice charges related to the policy during the following four years.

The policy's proscription against the unsolicited use of its communications system by an outside organization had been consistently administered and enforced, (Tr. 403, L. 8-25), without incident, until May 2000 when Union President Suzi Prozanski, in violation of the policy, sent a mass e-mail to unit employees. (G.C. Ex. 7). For example, former Union President Bill Bishop received a memo on this issue in 1997, which clearly stated that the e-mail system should not be used for Union business. (Resp. Ex. 7). Importantly, the Union filed neither a grievance nor an unfair labor practice charge over the June 3, 1997 memo given to Mr. Bishop by C.J. Heaton. (Tr. 288, L. 8-9, 12-14). Cynthia Walden also testified without contradiction that she routinely responded to the unsolicited e-mail sent to the Company's communications system by outside organizations and individuals, by sending a standard demand that the sender cease sending unsolicited e-mail to the Company's system. (Tr. 65, L. 12-16; Tr. 66, L. 7-10, 12-23; Tr. 399, L. 8-12; Resp. Ex. 17).

Prozanski acknowledged her violation of the policy, stating in writing:

> "While I should have known this, I last looked at the e-mail policy when it came out in 1996, so it was not on the top of my mind at the time... I sincerely hope that this is the only incident ever. I will do my best to make sure that others in the Guild are aware of the Company's e-mail policy."

(Resp. Ex. 2; Tr. 110, L. 13-25; Tr. 111, L. 1-9). However, until May 2000, the charging party, unlike other outside organizations, refrained from sending unsolicited organizational spam or individual mail through Company's communications system.

In a matter related to the unsolicited Prozanski/Union mass e-mail, bargaining unit employee Bill Bishop was also given a disciplinary memo on May 5, 2000 by Dave Baker, Managing Editor, for violating the Company's Communications System Policy by sending unsolicited spam to Company employees at their Company-provided e-mail addresses. (Resp. Ex. 8; Tr. 326, L. 15-23). The Union did not file a grievance or an unfair labor practice charge over the May 5, 2000 discipline of Prozanski or the May 5, 2000 discipline of Bill Bishop. (Tr. 393, L. 2-8; G.C. Ex. 8). The reason is clear. The Union had violated the long-standing, consistently enforced policy prohibiting the use of the Company's communications system for the purpose of sending unsolicited spam on behalf of an outside organization, and the Union unequivocally knew it.

The charging party points to only one outside organization, besides the Union, even mentioned in an e-mail sent to Company's employees at their Company-provided e-mail accounts, the United Way. Importantly, Respondent submitted unrebutted evidence that any mail received by employees regarding Weight Watchers was sent by the Company, on paper, not via e-mail, to promote a dietary program that Company was subsidizing to increase individual employee health, a legitimate employer concern and a non-controversial benefit to all employees who desired to participate. (Tr. 403, L. 22-25; Tr. 404, L. 1-3, 15-25; Tr. 405, L. 1-25; Tr. 231, L. 4-8). Similarly, Company, not the United Way, sent occasional e-mails to employees to promote a charitable organization that the Company supports. (Tr. 396, L. 7-19; Tr. 404, L. 1-24). There is an unbridgeable chasm between unsolicited spam sent directly into the Company's system by an outside third-party organization, and e-mail sent to employees by the employer itself.

Therefore it was totally appropriate and consistent with the Company's past practice for Cynthia Walden to send Suzi Prozanski the August 22, 2000 memo notifying Prozanski that she

had again violated the Company's Communications System Policy by sending unsolicited spam on behalf of an outside organization to Company employees at their Company-provided e-mail addresses. Walden said this in the memo:

> "In the current instance, you apparently used an outside terminal from which to send, but nevertheless communicated with *Register-Guard* employees from either a Company or Union list, for Guild activities.
>
> In May you acknowledged that your actions were inappropriate and I believe told Dave Baker that you would refrain from using the Company's systems for Union/personal business. We believe this current distribution of messages violates both the spirit and the letter of our communications policy and therefore, ask that you stop using the system for dissemination of Union information."

(G.C. Ex. 9; Tr. 89, L. 1-13). Again, the Union had unequivocal notice that the Company was enforcing it 1996 Communications System Policy to prohibit the Union's use of Respondent's equipment for Union business. Their claim is barred by Sec. 10(b).

This August 22, 2000 memo, the basis of unfair labor practice charge in Case No. 36-CA-8743, must be dismissed. The Company merely continued to enforce its 1996 Communications System Policy, over which the Union's repeatedly insisted on bargaining, did bargain, and knowingly complied with for four years, without dispute. There is no unfair labor practice here. If arguendo there ever could have been an unfair labor practice charge related to the Company's ongoing enforcement of its 1996 Communications System Policy, such a charge is barred by Section 10(b) of the Act.

The warning to Prozanski issued on May 5, 2000, is certainly outside the 10(b) period. As Chairman Hurtgen and a majority of the Board held in Allied Production Workers Union Local 12, 337 NLRB No. 6, a complaint is barred where operative facts occurred more than 6 months prior to the filing of an unfair labor practice charge, and the 10(b) period begins to run when a

party has clear and unequivocal notice of the violation. Id. at *2. When a party sends a written communication to the other side noting that it is aware that violative acts in question took place, the 10(b) definitely commenced no later than the date of said communication. Id. at *3.

Here Mr. Prozanski notified Respondent that she was aware that Respondent considered her May 2000 spam to be a violation of the Company's 1996 Communication System Policy. (Resp. Ex. 2, Tr. 110, L. 13-25; Tr. 111, L. 1-9). Further her letter states that she received notice of the Company's position on May 5, 2000. Therefore the 10(b) period commenced on May 5, 2000. (G.C. Ex. 8).

The bottom line is, the charge should be dismissed because the Company was acting in good faith enforcing its long-standing policy that was implemented in 1996 with the agreement of the Union. The Union's claims are barred by Section 10(b)

2. The Company's right to proscribe the unsolicited invasion of its communication systems by outside organizations for the purpose of distributing spam to Respondent's employees is absolute.

Importantly, the Board in Mid-Mountain Foods, Inc., 332 N.L.R.B. No. 19, *10 (slip opinion)(2000), explicitly stated that, with respect to the use of company equipment, such as loudspeakers, televisions, and video cassette recorders, **third parties have absolutely no right to use them under any circumstance**. Employers have **no obligation** to assist employees and the Union to distribute literature through the use of its equipment. Mid-Mountain Foods, Inc., at 4. The Board's holding was unequivocal. Of extreme significance is the fact that the Board stated that **its holding was only augmented by, though not dependent upon, the fact that the employer had not permitted use of its equipment by third parties for non-Union, non-business purposes**. Id. In so ruling, the Board held that the dissenting Board members were incorrect in applying the Board's prior application of either the solicitation or the distribution

balancing tests to determine whether the employees have a right to use these types of employer equipment. Id.[2]

In pre-Mid-Mountain cases, the Board has stated that Unions have **no** statutory right to use an employer's equipment, other media, or bulletin boards. Honeywell, 262 N.L.R.B. 1402 (1982); Union Carbide Corp., 259 N.L.R.B. 974, 980 (1981) (the employer can prohibit the use of bulletin boards, phones, and its mail system); The Heath Company, 196 N.L.R.B. 134 (1972) (the employer can deny employees the use of the employer's public address system). To the extent, if any, that the Board previously held that an employer's absolute right to proscribe the use of its equipment is contingent upon how consistently the employer applies the proscription, Mid-Mountain overruled such previous Board holdings.

Additionally, the rational behind the Board's absolutist pro-employer property rights position taken in Mid-Mountain Foods, Inc., is supported by the United States Supreme Court's holding that third party organizations have no right to access employer property unless employees are otherwise inaccessible. Lechmere, Inc. v. N.L.R.B., 502 U.S. 533-534, 112 S.Ct. 841 (1992); 6 West Limited Corp. v. NLRB, 237 F.3d 767, 779, n. 17 (7th Cir. 2000). Where reasonable alternative means of access exist, §7's guarantees do not authorize trespass by third party organizations, even under reasonable regulations. Id. The Court held that the third party trespasser carries a heavy burden of proof, as the exception to the general rule is narrow, as is

[2] If one were to characterize third party organizational spam as either distribution or solicitation, based on the Board's explanation of the basis for the distinction between the two types of communication, such spam is certainly more like a distribution than a solicitation, because 1) it is not spoken, but written in a permanent form; 2) a uniform message is communicated to a large number of people at one time; 3) it can be permanently stored, viewed, and responded to, if at all, at the recipient's leisure, and as often as the recipient decides to view it; and 4) spam has the potential to litter the employer's system and interfere with productivity. (Tr. 167, L. 13-19); Stoddard-Quirk Manufacturing Co., 138 N.L.R.B No. 75 (1962). As admitted by the charging party's witness, the recipient does not feel obligated to answer. (Tr. 167, L. 13-14). Although the ALJ specifically refrained from ruling on the issue, there is no question but that employees' computers are work areas. A rule prohibiting distribution in work areas is presumptively lawful.

evidenced, the Court noted, by the fact that trespassers' organization activities have rarely found favor in the courts. Id. at 535, 539.

The employer's right to exclude third party trespassers even applies where non-trespassory access may be possible, yet cumbersome or less-than-ideally effective. Id. at 539. Where the Union had the ability to advertise its cause through, for example, the use of signs and other media, they have no right to access the employer's property. Id. In fact, the exception only applies where "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable Union efforts to communicate with them. Id. Employees who do not reside on the employer's property are not "beyond the reach" of third party organizers. Id. at 540.

Last, Board law and case law clearly established that, contrary to ALJ McCarrick's reasoning and holding, it is irrelevant to what extent management employees obeyed Respondent's general work rules and policies in determining whether Respondent discriminatorily enforced said policies. Beverly Enterprises-Hawaii, Inc., 326 NLRB 335, 339-340 (1998); Reno Hilton Resorts, Corp., 319 NLRB 1154, 1189 (1995); NLRB v. United Steelworkers of America, 57 U.S. 357, 78 S. Ct. 1268 (1958).

a. Respondent did not permit its communications system to be used by other similar outside organizations under similar circumstances.

ALJ McCarrick failed to find or consider the aforementioned facts in making his determination that a violation of the Act occurred. In light of all the aforementioned arguments, Respondent had an absolute right to prevent outside organizations from using Respondent's equipment. A contrary holding would require one to reach the untenable conclusion that, once an employer allowed an individual to use its various equipment, any outside organization, including a union, would have the right to highjack the employer's electronic communications system for its own purposes. Extending that conclusion to analogous circumstances highlights the madness of

such a holding. For instance, under such a holding an employing publisher who, in an attempt to help an organization find a local missing child, voluntarily printed flyers depicting the name and face of the missing child and a contact number to call with information, would thereafter be required to allow a union or any other outside organization to use its presses, its ink, its paper to promote their respective causes. May it never be! There is no similarity between union solicitations and a Company-subsidized dietary health promotion, a Company-sponsored United Way charity campaign, or an attempt to find a missing child.

The United States Court of Appeals for the Seventh Circuit, which the Board has looked to for guidance on this subject, set forth a more balanced approach, holding that there is no case of discrimination unless the General Counsel proves that other "similar" outside third party organization solicitations were permitted to use the employer's equipment to promote a similar cause, such as an association membership solicitation, an anti-union solicitation, or a call to employees to take group action. Guardian Industries Corp. v. N.L.R.B. (hereinafter "Guardian"), 49 F.3d 317, 319-322 (7th Cir. 1995); 6 West Limited Corp., at 780 (not all organizations are similar, and disparate treatment of Unions and charities can be warranted and lawful because charitable causes may indisputably benefit all employees, without causing controversy); Fleming Companies, Inc., 336 N.L.R.B. No. 15 *14-16, 2001 NLRB LEXIS 792 (Hurtgen, dissenting).

In Fleming Companies, Inc. the Board wrongly rejected the distinction between treatment of solicitations encouraging or inducing employees to act as a group and postings sponsored by individuals not designed to prompt group action, holding, rather, that the employer's toleration of a wide range of employee postings of individual messages (such as "thank you" notes, wedding invitations, etc.) and individual notices of sales, despite the employer's policy proscribing any and

all non-business use of the employer's bulletin boards, required the employer to permit union solicitation via the employer's bulletin boards, 336 NLRB, * 11.

However, current NLRB chairman Hurtgen, in his elucidating and poignant dissent in Fleming Companies, Inc., at 14, 16, disagreed with the majority's aforementioned holding, on the grounds that he believes that the Board must determine whether the employer permitted outside organizations to use the employer's equipment to: 1) sell its products; 2) distribute "persuader," political, or religious literature, or 3) promote organizational meetings or induce group action for social, sports, or political reasons on behalf of any "similar" outside organization. Chairman Hurtgen's focus was on whether the posting prohibited and those allowed were "like postings," Id. at 16:

> In practice, however, the Respondent routinely tolerated employee posting of individual messages (such as 'thank you' notes, wedding announcements, etc.) and individual notices of sale (such as cars or a television). As found by the judge, however, there is no evidence that the Respondent ever permitted employees to post notices of outside clubs or organizations. Nor does the record demonstrate that the Respondent ever countenanced employee postings of notices inducing group action by social, sports, political, or any other type of outside organization...
>
> As stated by the court, '[a] person making a claim of discrimination must identify another case that has been treated differently and explain why that case is 'the same' in the respects the law deems relevant.' The court noted that such discrimination would be shown had the employer maintained a rule distinguishing between pro-union organization and anti-union organization. However, the court stated that it was impossible to understand how a rule equally applied to all outside organizations could constitute disparate treatment of Unions. I find this analysis directly applicable to the instant case... There is no Section 7 right to post literature on company bulletin boards. There is only a Section 7 right to be free from discriminatory treatment. Thus, the relevant inquiry is whether the Respondent's posting policy treats, even handedly, like postings. If, as here, it does, there is no warrant for a special exception for Union literature.

Fleming, Hurtgen, Member, dissenting, at 14. 16.

Board Member (now Chairman) Hurtgen, in another superior and pertinent dissent, stated as follows:

> "My colleagues condemn this [employer's] nondiscriminatory policy. In their view, if an employer opens its property to groups seeking charitable contributions, that employer must open the property to unions. This view is contrary to the public interest. The consequence of this view is that some employers will simply close their doors to charitable groups. The public, and (more importantly) the beneficiaries of the public's largesse, would suffer. It is no answer to say that Board law has an exception for 'a small number of isolated beneficent acts.' In the first place, the phrase is not a model of clarity, and employers will be uncertain as to the parameters of that fuzzy line. I fear that some will err on the side of caution, and will not permit any beneficent acts. We should encourage employers to be as generous as they wish with respect to allowing access for beneficent acts."

Albertson's Inc., 332 N.L.R.B. No. 104 (2000).

In Guardian, at 4-6, a case cited by the Board and later Seventh Circuit cases as the seminal case outlining the treatment of dissimilar attempts use employer equipment for solicitation, the United States Court of Appeals for the Seventh Circuit, the employer prohibited the union from posting organizational meeting announcements on the employer's bulletin boards. However, it allowed "for-sale" notices to be posted. In finding that the employer could proscribe the use of its bulletin boards for posting union organizational meeting notices while permitting the use of the bulleting boards for the posting of personal notices on the grounds that the two types of postings were not similar in any relevant way, the court did not rely on the fact that the record did not indicate that the employer allowed employees to post a wide variety of personal notices, and nothing in the court's reasoning could be found to say that the employer's ability to prohibit the

use of its e-mail system by outside organizations depends on variety and number of dissimilar e-mails the employer has permitted in the past. Id.

In contrast, the Guardian court cited numerous other postings that the employer, in addition to allowing "for-sale" notices, could permit without violating the Act on the grounds that the nature of the postings are not similar to union organization meeting postings in any relevant way. Id. at 319. The court stated that an employer could, for example, allow employees to post baby pictures on the employer's bulletin boards while prohibiting employees from postings NAACP notices seeking donations, notices of an anti-abortion rally, a meeting of the Grey Panthers or the American Association of Retired Persons, and schedules of the worship services of the local Roman Catholic church, and such specific proscriptions would not be "'discriminatory' in any intelligible sense." Id.

Relying on United States Supreme Court precedent, the Seventh Circuit reasoned that the use of an employer's bulletin board, a nonpublic forum, may be confined to particular purposes or kinds of notices without running afoul of laws barring discrimination against disfavored viewpoints and subject matters, Id. at 319, citing United States v. Kokinda, 497 U.S. 720, 105 S.Ct. 3115, 111 L.Ed. 2d 571 (1990), and International Society for Krishna Consciousness, Inc. v. Lee, __ U.S. __, 112 S.Ct. 2709, 120 L.Ed. 2d 669 (1992); Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 105 S.Ct. 3439, 87 l.Ed.2d 567 (1985), and employers may even open its internal mail system to communications about civic and church meetings, while keeping it closed to communications on behalf of unions. Id. at 320, citing Perry Education Ass'n v. Perry Local Education Ass'n, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2s 794 (1983); See Cleveland Real Estate Partners v. National Labor Relations Board, 95 F.3d 457, 465 (6th Cir. 1996) (holding that an employer may allow charities, and religious groups to use solicit while

prohibiting union solicitation, and that "discrimination" means favoring one union over the other, or allowing employer-related information while barring "similar" union-related information.

In the Seventh Circuit's most recent ruling on this issue, the court again stated that in determining whether the employer has treated union solicitations equally to similar solicitations, **the relevant comparison to be made is between the way an employer has treated unions and other non-employee entities conducting similar activity in similar, relevant circumstances,** not between the employer's treatment of union organizational activity and employee personal activity. 6 West Limited Corp., at 779. In 6 West Limited Corp, at 774, the employer permitted employees to engage in a wide array of solicitations on its premises, including solicitations for girl scout cookies, personal employee Christmas ornament sales solicitations, personal employee hand-painted bottle sales solicitations, and theater ticket and raffle ticket sales solicitations on by and on behalf of unidentified parties. However, during work time, employees were prohibited from attempting to solicit other employees in an effort to induce them to become union members. Id. at 773.

The court held that the solicitations permitted by the employer, which were beneficial to all employees, were not, under any circumstances, similar or comparable to union organization solicitations, about which some employees complained to management. Id. at 780. The court pointed out that the permitted solicitations would have been relevantly similar to the proscribed union solicitations if the permitted solicitations would have been made to solicit business, political, or other organizations to solicit membership. Id. at 780, n.18. Additionally, the court found that the no evidence was admitted to show that the employer allowed other unwanted solicitation on its property. Id. at 780.

Here, the record is devoid of any evidence that the Company allowed similar outside organizations to use its communications system in a similar way, for similar purposes - sending unsolicited, outside organizational solicitations to employees to take group action on behalf of the outside organization. To the contrary, the undisputed evidence in the Record shows that Respondent treated unsolicited, outside organizations, including the union, the same way since the adoption and implementation of the 1996 Communications System Policy. Further, to the extent, if any, that the Board finds that Respondent allowed e-mail to be proliferated through its communication system by the only outside organization mentioned in the Record in this regard – United Way[3]-on the grounds that it was mentioned in occasional e-mails sent by the Respondent to employees, such references to those organizations were dissimilar to the Union solicitations on numerous levels. First, they were sent by Respondent, not the United Way. Second, the occasional e-mails sent by Respondent pertaining to the United Way related to Respondent's attempt to support its chosen charity. Third, none of the aforementioned e-mails solicited employees to take group action or support or reject a labor organization. There is no relevant similarity between permitted and proscribed solicitations, and there was no discrimination against union organizational solicitations.

The Board must apply Chairman Hurtgen's, the Guardian court's and the 6 West Limited Corp., court's reasoning, reverse ALJ McCarrick's determination that Company violated the Act by proscribing unsolicited, outside third-party organizational spamming of Company employees, and dismiss the charge.

[3] Any information received by Respondents employees was received via a payroll stuffer, not an e-mail. (Tr. 403-405; Resp. Ex. 19). General Counsel's own witness testified that Weight Watchers was not allowed to use the e-mail system. (Tr. 231, L. 4-8).

b. Even assuming the absence of an agreement on the Policy, the unsolicited Guild spam constituted a trespass to chattels.

Sending mass electronic messages over the Company's $3 million electronic communications system (hereinafter "spamming") constitutes a trespass to chattels for which the Company could have, but chose not to bring legal action and seek a permanent injunction against Ms. Prozanski and the Guild. The National Labor Relations Act does not encroach upon state trespass laws. Lechmere, Inc., at 527, 534. The real issue is whether the Board will allow property owners, such as *The Register-Guard*, to exercise common sense and preserve the value of their investments by limiting third party access to its equipment by prohibiting third party soliciting and spamming – an abuse of the e-mail system.

Trespass to chattel is rooted in the state common law, and, as the California Court of Appeals noted, the common law "adapts to human endeavor." The common law has adapted to the onslaught of e-mail communications. Unsolicited spamming routinely has been held to represent a trespass. Intel Corporation v. Hamidi, 2001 Cal.App. LEXIS 3107, 2001 Cal.Daily op. Service 10296, 2001 Daily Journal DAR 12793 (Dec. 10, 2001), review granted on March 27, 2002, (attached hereto as Appendix A); America Online, Inc. v. IMS, 24 F.Supp.2d 548, 550 (1998); Thrifty-Tel., Inc. v. Bezenek, 46 Cal.App.4th 1559, 1566 (1996); CompuServe, Inc. v. Cyber Promotions, Inc., 962 F.Supp. 1015, 1026 (1997). A trespass to chattels is defined as the unauthorized interference, however slight, with another's enjoyment of his/her personal property. Intel Corporation, at 14-16; America Online, Inc., at 550.

The trespasser does not need to physically touch another's property in order to trespass. In fact, the creation of an electronic signal sent to a private company by a computer hacker can serve as the trespass. Thrifty-Tel., Inc., at 1566; CompuServe, Inc., at 1026. Contrary to ALJ McCarrick's reasoning, (D. 9, L. 4-5), the trespasser need not usurp more than a small amount of

the property owner's electronic communications system in order to constitute a trespass. Intel Corporation, at 19, citing Bay Inc. v. Bidder's Edge, Inc., 100 F.Supp.2d 1058, 1071 (N.D. Cal. 2000). The property owner who merely seeks to prevent future unsolicited spamming does not even have to prove that it suffered nominal damages, but rather the property owner need only establish that the trespasser has disrupted the property owner's full enjoyment of his/her property. Intel Corporation, at 12. If the property owner merely seeks to enjoin future spamming, the limited remedy sought by the property owner further serves to "color the analysis" in favor of finding that the spamming at issue is a trespass.

In Intel Corporation, for example, the trespasser sent only six spams to the property owner, an employer, in over two years, and Intel's employees had, at most, one additional e-mail in their respective e-mail boxes when they came to work in the morning on those few occasions. The California Court of Appeals held that "every e-mail that an employee reads at work could constitute a trespass. The answer is, where the employer has told the sender the entry is unwanted and the sender persists, the employer's petition for redress is proper." Intel Corporation, at 14-15. That an employer's employees are drawn away from their jobs to deal with spam constitutes a sufficient disruption to the employer's system to constitute a trespass. Id. at 17.

Responding to the trespasser's claim that because the employer allowed its electronic communication system to be used for personal use, unsolicited spamming should be permitted, the Intel Corporation court stated that "Such tolerance by employers would vanish if they had no way to limit such personal usage of company equipment." Id.

Here, as in Intel Corporation, America Online, Inc. and CompuServe, Inc. *The Register-Guard* had an Communications System Policy in place since 1996 prohibiting third parties from accessing the Guard's computer system for the purposes of spamming Guard employees. (Tr. 45,

L. 1-8; Tr. 110, L. 13-25; Tr. 287, L. 2-25; Tr. 288, l. 10-18; Resp. Ex. 2; Resp. Ex. 7, G.C. Ex. 2). This policy was not only bargained over, (Tr. 63, l. 6-18; Tr. 386, L. 12-25; Tr. 387, L. 1-25; Resp. Ex. 12; Resp. Ex. 13), and communicated to Ms. Prozanski and all other bargaining unit members in writing, but the Guard also orally warned the Union and Ms. Prozanski that spamming violated the Company's Communications System Policy and was not permitted. (Tr. 78, L. 5-12; Tr. 127, L. 9-24; Tr. 214, L. 2-13; Resp. Ex. 4; Resp. Ex. 8). Under Intel Corporation, the Company has established all the necessary elements of a legitimate trespass to chattels claim, and the Guard was well within its right to attempt to enjoin future third party spamming.

The California Court of Appeals in the Intel Corporation case had this to say about third party spam:

> The Intel e-mail system is private property used for business purposes. Intel's system is not transformed into a pubic forum merely because it permits some personal use by employees.... Hamidi insists that Intel's act of connecting itself (and thus, its employees) to the internet and giving its employees e-mail addresses make Intel's e-mail a pubic forum. By the same reasoning, connecting one's realty to the general system of roads invites demonstrators to use the property as a public forum and buying a telephone is an invitation to receive thousands of unwanted calls. That is not the law.... No citizen has the general right to enter a private business and pester an employee trying to work.... This highlights a critical factual misstatement in Hamidi's brief, that he has been enjoined "from sending e-mail over the internet to Intel employees." The injunction prohibits Hamidi "from sending unsolicited e-mails to addresses on Intel's computer systems." Hamidi is free to send mail – "e" or otherwise – to the homes of Intel employees, and is free to send them regular mail. The injunction simply requires that Hamidi air his views without using Intel's private property.

Intel Corporation, at 34-38.

The Board must protect the Company's ability to exercise its property rights by proscribing third party spam. The Board must dismiss the charge.

c. The consistent application of Respondent's 1996 Communications System Policy did not diminish to an unacceptable degree the employees' ability to communicate with each other about organization.

Here, much like in Lechmere, Inc., and 6 West Limited Corp., the unrebutted evidence in the record shows that the General Counsel did not carry its heavy burden of proof to show that an outside third party organization like Eugene Newspaper Guild must have access to the Company's Electronic Communications System to communicate to the employees it represents. Rather, the General Counsel's witnesses admitted that the Union had ample channels of communication to the Company's employees it represents:

1. The Union has a monthly print publication called *The Guardian* that it distributes to employees. (Tr. 118).
2. The Union distributes written bargaining bulletins to update its members on collective bargaining issues. (Tr. 119). The Union pays for the printing of these publications and has it done at Kinkos. (Tr. 121).
3. The Company provides the Union with the names and addresses of all the employees so the Union may send them things through the U.S. Mail. (Tr. 125).
4. By agreement with the Company, the Union has Union bulletin boards in all the departments were it represents employees and in the cafeteria. (Tr. 117-118; Resp. Ex. 3). In fact, former Union chief negotiator Lance Robertson testified "The Guild considers our

bulletin boards an important tool for communicating with members" and wrote an article about the bulletin boards' importance in the Union's publication *The Guardian.* (Tr. 212).

5. Personal conversation. (Tr. 76, L. 17-20; Tr. 124, L. 3-25; Tr. 384, L. 18-25; Tr. 204, L. 22-25; Resp. Ex. 5).

6. Displaying pro-Union signs and personal automobiles. (Tr. 239, L. 20).

7. Wearing armbands when not working with the public. (Tr. 240, L. 5-11; Tr. 258, L. 1-25; G.C. Ex. 62).

Applying clear Board and United Stated Supreme Court precedent, ALJ McCarrick's conclusion cannot be sustained under the alternative rational that Respondent's 1996 Communications System Policy, even though applied on non-discriminatory basis, did not place the employees out of reach of union organizers. The Board must reverse ALJ McCarrick's determination that Respondent's application of its facially valid Communications System Policy does not, in its impact on union solicitations, violate the Act, and the Board must dismiss the charge.

3. The Board must not engage in contract interpretation to determine whether respondent's enforcement of its 1996 Communications System Policy and its insignia policy violated the Act.

If the Union desired to dispute the extent to which the 1996 Communications System proscribes the Union's ability to send unsolicited spam to Company employees, whether the Company's insignia policy was an implied term of the collective bargaining agreement, or whether the Company's insignia policy covered the activity at issue, the Union is essentially asking the NLRB to engage in contract interpretation. However, that is not a function within the

Board's province. In Intrepid Museum Foundation, Inc., 335 NLRB No. 1, at p. 17 (August 22, 2001), the Board ruled that where the dispute is solely one of contract interpretation, "the Board will not seek to determine which of two plausible contract interpretations is correct," citing Westinghouse Electric Co., 313 NLRB 452 (1993); Crest Litho, Inc., 308 NLRB 108, 110 (1992); Atwood Morrill Co., 289 NLRB 790, 795 (1988); Thermo Electron Co., 287 NLRB 820 (1987); NCR Corp., 271 NLRB 1212, 1213 (1984); and Vickers, Inc., 153 NLRB 561, 570 (1965).

In light of Ms. Prozanski's admission that spamming Company employees at their Company-provided e-mail addresses violated the long-standing 1996 Communications System Policy, the charging party's argument is without foundation, and it is one essentially founded upon contract law, not Board law.

In fact, the ALJ's determination is entirely based on a necessary finding that the parties' collective bargaining agreement does not include the 1996 Communications System's prohibition against using the Company's communications system to conduct Union business.

ALJ McCarrick's holding that the insignia policy is vague and its enforcement, therefore, is unlawful is also a contract interpretation.

ALJ McCarrick clearly overstepped his authority in ruling in this case, and the Board must reverse this clear error and dismiss the charge.

4. All charges related to enforcement of decades-old insignia policy reflects Respondent's maintenance of the status-quo.

For over a decade, (Tr. 376), *The Register-Guard* has had a clear policy prohibiting the wearing of controversial insignias, including union insignias, by employees when they are with the public and/or customers of *The Register-Guard.* (Tr. 356-360) (unrebutted testimony of Advertising Director, Michael Raz); (Tr. 331-334) (testimony of Managing Editor, Dave Baker; Resp. Ex. 10). In fact, when then Managing Editor Jim Godbold issued a 1997 memo restating

the Company's ongoing policy prohibiting reporters from wearing Union insignia when they were meeting the public, the Guild filed neither a grievance nor an unfair labor practice charge over the memo. (Resp. Ex. 10; Tr. 334).

Circulation Director Chuck Downing had this to say about that policy:

> Q: Now, does *The Register-Guard* have a policy that you are aware of concerning District Managers wearing insignia of any kind while working?
> A: Yes.
> Q: And what is that policy?
> A: That while in execution of their duties in the field, they are not to wear anything that is not appropriate to the business; that while out conducting business with the public, which would include carriers, subscribers, and non-subscribers that they are basically there to do the business of the Company as a representative.
> Q: Has that policy been in place as long as you have worked at *The Register-Guard*?
> A: Yes.
> Q: Do you know why the policy exists?
> A: Yes. I think it is for a couple of real important reasons. One is that they are our representative. They represent the Company while they are in the field working with the carriers and the public, and so as that it is important for them to put us forth in the best light possible. If they do not do that, it can adversely effect our business.

Respondent's attempt to enforce its insignia policy in relation to Kangail's activity in December 2000 clearly reflects a mere maintenance of the status quo. As argued above (See Arg. Sec. A, 1), the Board must dismiss the charge under Section 10(b) of the Act.

5. Special Circumstances existed to warrant the enforcement of Respondent's decade-old controversial insignia policy with respect to Ron Kangail.

ALJ McCarrick's determination that Respondent's enforcement of its insignia policy with respect to Ron Kangail violated Section 8(a)(3) is clear error. Contrary to the ALJ's conclusion, special circumstances existed to permit Respondent to prohibit Ron Kangail from wearing and/or displaying union insignia when working with customers, and the Company's past application of

its policy does not demonstrate that its proffered legitimate reason for enforcing its policy against Kangail was a pretext for discrimination.

a. Respondent established that special circumstances existed to warrant prohibiting Kangail from wearing union insignia with customers.

Employers have the right to prohibit employees from wearing Union insignia, when the employees at issue have sufficient contact with the public as part of their job. Burger King Corp. v. NLRB, 725 F.2d 1053, 1055 (6th Cir. 1984); MidState Telephone Corp. v. NLRB, 706 F.2d 401, 404 (2nd Cir. 1983); NLRB v. Harrah's Club, 337 F.2d 177 (9th Cir. 1964); Eastern Omni Constructors v. NLRB, 170 F.3d 418, 426 (4th Cir. 1999). In John P. Scripps Newspapers d/b/a Record Searchlight Redding Newspaper Journalist Assoc., 1992 NLRB LEXIS 746, * 12, 20-CA-24130, adopted by the Board (Sept. 10, 1992), (attached hereto as Exhibit B), the Board held that the publisher's rule did not violate the Act, when the rule prohibited employees from wearing a Union button only while the employees were representing the newspaper in dealing with the public. Id. at 6.

Contrary to the ALJ's holding, no case stands for the proposition that an employer is required to demonstrate that its business has actually been adversely affected before it can establish that special circumstances exist warranting a proscription against wearing insignia when dealing with customers or business persons. However, that was the primary basis for ALJ McCarrick's determination in this case. (D.10, L. 3-5). As noted above, however, Board law and case law establishes that an employer must only demonstrate that the employee had extensive contact with the public and that the proscription be narrowly tailored to avoid the potential harm.

Here, Ron Kangail had extensive contact with the public, and Respondent's insignia policy was narrowly tailored to prohibit wearing union insignia only during those times Kangail was actually in contact with the public. Ron Kangail is a Circulation Department District

Manager who works in the field managing a geographical district for *The Register-Guard.* In December 2000, he was managing District 400. (Tr. 254). In that capacity, Mr. Kangail, on behalf of *The Register-Guard,* negotiates and signs and terminates contracts with independent contractor newspaper carriers as a "Guard Publishing Company representative." (Tr. 253; Tr. 255; Resp. Ex. 6). Within District 400, Respondent had contracts with approximately 60 independent contractors who collectively on a daily basis purchase 2,800 newspapers from *The Register-Guard.* (Tr. 254-255). As a District Manager, it was part of Kangail's job to do everything reasonably possible to have these carriers sell more subscriptions and therefore earn more money for *The Register-Guard.* (Tr. 255). That as a District Manager for District 400, it was part of his job to recruit/find individuals to sign independent contractor agreements to deliver *The Register-Guard* where routes did not have a contracted carrier. (Tr. 255).

Kangail admitted that, as a District Manager, it was in his best interest to have all routes filled all the time, and to maintain a good *Register-Guard*/carrier relationship with the carriers, and good *Register-Guard*/subscriber relationship with subscribers. (Tr. 255-256). Kangail testified that carriers, who purchase papers from Respondent at a wholesale price and resell them to subscribers at a retail prices, as well as subscribers are the customers of *The Register-Guard.* (Tr. 260). In fact, one aspect of his job was to use his best efforts to run the district in a way to maximize the number of subscribers. (Tr. 256). Kangail uses his personal vehicle when working in District 400, and *The Register-Guard* reimburses him for mileage for the use of that vehicle. (Tr. 256).

As the Company explained to Kangail when it explained the enforcement of its insignia policy 1) it was and is Kangail's job to represent the Company to the public; 2) Kangail, as a District Manager, was and is usually the only person from the Company that a carrier or

subscriber will come in contact with; 3) Kangail, as a District Manager, had to represent *The Register-Guard* in a positive way and promote the Company and avoid controversial topics when working with the public/customers. (Tr. 372). Clearly, the unrefuted evidence in the Record established that special circumstances existed to warrant prohibiting Ron Kangail from wearing/displaying union insignia in public. ALJ McCarrick's finding to the contrary was clear error and must be reversed. The Board must dismiss the charge.

b. Respondent narrowly tailored its insignia policy to prohibit Kangail from wearing union insignia only to the extent necessary to protect Respondent's business and product.

In accordance with John P. Scripps, Respondent complied with the Act by limiting the application of its insignia policy only to the extent necessary to protect Respondent's business. The uncontradicted evidence in the Record shows that Mr. Kangail was free to have the sign in his vehicle window when he was at home, while his car was parked in *The Register-Guard*'s parking lot, or at any other time he was not working for Respondent in public. (Tr. 357, L. 14-25; Tr. 358, L. 1; Tr. 368, L. 4-10; Tr. 376, L. 1-6; Tr. 378, L. 18-25; Tr. 379, L. 1-13; Tr. 359, L. 15-23; Tr. 360, L. 3-15). Kangail was just asked merely to refrain from wearing or displaying union insignias when he was in his district doing business. At the time, the Union was running radio commercials to advertise its position, and Mr. Kangail testified that there was nightly news coverage. (Tr. 257). It is clear from Mr. Kangail's testimony that his purpose in wearing a green armband and in displaying the sign on his vehicle was "to show unity of Guild members and it was also to show that we had been without a contract." (Tr. 258). His display and wearing of union insignia was clearly connected to a controversy related to the Union's position in negotiations.

Mr. Kangail testified that he wore the armband in the building and in the lunchroom and that no one tried to stop him. Mr. Kangail swore in a Board Affidavit that Mr. Hunt only told him "to take off the green armband while outside the office on Company business." (Tr. 263-264). Mr. Kangail further admitted that he gave sworn testimony in his NLRB affidavit that stated "When I asked him why I had to do these things he had instructed me to do, Hunt said it was not appropriate to wear or have displayed Guild banners while meeting the public." (Tr. 264). Mr. Kangail, an evasive witness, grudgingly acknowledged that there was no reason he could not have displayed the sign in his vehicle in the Company parking lot and that he had seen other cars with the placard in their vehicles in the Company parking lot. (Tr. 265).

Respondent enforced its decades-old insignia policy only to the extent necessary to protect its legitimate business concerns. The Board must reverse the decision of the ALJ and dismiss the charge.

B. THE COMPANY'S COUNTERPROPOSAL NO. 26 WAS A MANDATORY SUBJECT OF BARGAINING. IT COULD NOT, THEREFORE, HAVE ALSO BEEN AN ILLEGAL SUBJECT OF BARGAINING.

Even if the Company's right to proscribe the use of its equipment by third-party organizations is not absolute, it is ludicrous to hold, as ALJ McCarrick held in this case, (D. 10, 37-40, n.11), that an issue can be both a mandatory subject of bargaining and an illegal subject of bargaining. And the Company has the right to propose that the Union bargain away the employees' "right" to use Respondent's communications equipment for the purposes of conducting union business.

1. Company Counterproposal No. 26 represents a mandatory subject of bargaining.

ALJ McCarrick admitted that Board law, as cited by Respondent in its Brief to the ALJ, clearly states that a computer access policy is a mandatory subject of bargaining. Associated

Services for the Blind, Inc. (hereinafter "ASB"), 299 NLRB 1150, 1158 (1990). Yet, inexplicably, ALJ McCarrick held that Board law stating that a subject is irrelevant in determining whether that same subject is an illegal subject of bargaining, as if the two categorizations are not mutually exclusive. The ALJ's flawed expressed rational for his determination that Respondent's Counterproposal No. 26 is an illegal subject of bargaining was that Respondent had previously discriminatorily enforced a facially valid communication systems policy embodied in the Counterproposal.

If the Board were to extend ALJ McCarrick's rational to analogous situations, the infirmity of his decision would become even more apparent. For instance, under ALJ McCarrick's reasoning and conclusion, an employer has been found to have improperly applied a long-standing, facially neutral merit-pay or bonus system that had not been not written into the text of the parties' collective bargaining agreement in order to financially reward/punish employees based on their union activity, that employer could not bargain in the future to integrate the facially neutral terms of that same merit pay or bonus system into the collective bargaining agreement. However, the Board has never reached such a conclusion or issued such a remedy for past discriminatory practices, and such a remedy stands in stark contradiction with the clear precedent stating that the Board has no right or authority to interject its opinion as to the parties' bargaining positions and proposals. Atlanta Hilton & Tower, 271 NLRB 1600 (1984); John Ascuaga's Nugget, 298 NLRB 524 (1990). Rather, the traditional and proper remedy has always been limited to a cease and desist order and/or an affirmative action order requiring reinstatement or employee record expungement, depending on the nature of the discriminatory actions taken by the employer.

Judge McCarrick held that the Company's 1996 Communications System Policy is facially neutral. (D. 7, L. 31-33). Company Counterproposal No. 26 merely recites the 1996 Communications System Policy in all relevant regards. (G.C. Exs. 2, 49). The Board cannot, under the guise of issuing a remedial order, prevent Respondent from bargaining over a facially neutral policy that is, as the Board has already found, is a mandatory subject of bargaining. The Board may only act to remedy an unlawful application of the facially neutral policy once it occurs.

2. The Union could waive the employees' "rights" to use the Company's communications equipment.

As a necessarily implied conclusion established by the Board's ruling in ASB, the union, as the employees' elected bargaining representative, could waive employees' alleged right to use the Company's communications system for union business. Therefore, ALJ McCarrick's ruling, which would prohibit Respondent from bargaining over the facially valid, (D. 7, L. 30-31), communication systems access rules contained in Company Counterproposal No. 26, could not be justified under the rational that the Company's Counterproposal No. 26 would require the Union to waive unwaivable Section 7 rights.[4]

Section 7 rights are not absolute. National Labor Relations Board v. Gale Products Div. of Outboard Marine, Corp., 142 NLRB 1246 (1963) enforcement denied, 337 F2d 390, reversed, National Labor Relations Board v. Magnavox Company of Tennessee, 415 U.S. 322, 324-26, 329, 94 S.Ct. 1099, 1101 (1962). As long as a union does not bargain away the unit member's rights to exercise Section 7 Rights to choose a bargaining representative or agree to a complete plant-

[4] ALJ McCarrick did not articulate this rational, however, the charging party argued that it could not waive unit members' right to use the Company's communications equipment as proposed in Company Counterproposal No. 26. ALJ McCarrick's decision necessarily implies that the ALJ agreed with the charging party's argument, which clearly contradicts Board law and binding and persuasive case law.

wide ban on all forms of distribution and solicitation, a union may, at any time, bargain away the unit members' rights, if any exist, to use an employer's communications equipment to conduct union business. Metropolitan Edison Company v. National Labor Relations Board, 460 U.S. 693, 706 103 S.Ct. 1467, 1476 (1983) (A union may waive unit member's right to strike), citing 415 U.S. 322, 325, 94 S.Ct. 1099, 1101, 1002 (1974). National Labor Relations Board v. Gale Products Div. of Outboard Marine, Corp., 142 NLRB 1246 (1963) *enforcement denied*, 337 F2d 390, *reversed*, National Labor Relations Board v. Magnavox Company of Tennessee, 415 U.S. 322, 324-26, 94 S.Ct. 1099, 1101 (1962) (the rights of solicitation and distribution of employees by employees is not absolute), and 415 U.S. 329 (Stewart, J., Dissenting) ("I presume the Court agrees, that the union could waive any right that the employees have to distribute union institutional literature."); Gale Products, Div. of Outboard Marine Corp. and Marine Motor Lodge No. 1659, 142 NLRB 1246, enforcement denied on other grounds 337 F2.d 390 (7th Cir 1964), *aff'd* Magnavox, at 329 (waivers of the right to distribute for or against a union representative are uniquely invalid because "[w]hile other problems might well be aired at union meetings, the desire to designate a different representative is hardly an appropriate subject for discussion at a meeting held under the auspices of the very union sought to be displaced); National Labor Relations Board v. United Technologies Corp., 706 F.2d 1254, 1263-64, n. 8 (2nd Cir. 1983), citing Magnavox, at 324-327 (time and place limitations on Section 7 rights can be made part of a collective bargaining agreement; the Union is only prohibited from agreeing to a blanket ban on distribution and solicitation); National Labor Relations Board v. Mid-State Metals Products, Inc., 403 F.2d 702, 705 (5th Cir. 1968) (a union can waive employee rights where no conflict of interest exists, as "it can be fairly assumed that employee rights will not be surrendered except in return for bargained-for concessions, and that rational only disappears where the subject matter waived

'goes to the heart' of the right of employees to change their bargaining representative, or to have no bargaining representative."); *See also* Hotel Employees & Restaurant Employees Union, Local 5, AFL-CIO v. Honolulu Country Club, 100 F.Supp.2d 1254 (D. Hawaii 1999).

The situation is analogous to a union that waives the employee's right to strike, which a union may do during the course of bargaining without violating the Act. Magnavox, at 325. Respondent has found no Board cases or court cases in which the Board or the courts held that the union cannot agree to a place/time restriction on solicitation/distribution, such as a proscription against using the employer's e-mail system, as opposed to agreeing to a total ban on solicitation/distribution on the employer's premises, and there is no logical rational for the position that a union can waive the employee's right to strike, but it cannot waive employees' "rights" to conduct union business on the employer's communications system.

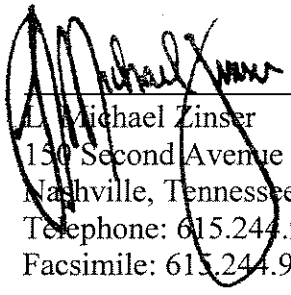
The only issue ALJ McCarrick should have addressed in this regard, and the only issue the Board must now address is whether the Union has a conflict of interest regarding the right that would be bargained away under Company Counterproposal No. 26. No such conflict of interest exists in this case. The unrebutted testimony in the Record shows that Company Counterproposal No. 26 involves neither a total ban on distribution/solicitation on Guard property, nor a waiver of the employees' right to choose a new bargaining representative. (D. 6, L. 45-46; G.C. Ex. 53). Company Counterproposal No. 26 merely contains a place/time proscription on distribution that relates solely to the use of its communications equipment for union purposes. Therefore, it would not violate the Act for the Union to agree to the proscriptions therein, or, necessarily, for Respondent to propose them. The Board must reverse the decision of the ALJ and dismiss the charge.

V. CONCLUSION

For all the foregoing reasons, *The Register-Guard* respectfully requests that the Second Consolidated Complaint, all amendments thereto, and all underlying charges be dismissed in their entirety, that the Exceptions of *The Register-Guard* be granted and that the Decision of the ALJ be reversed to the extent that Respondent has excepted thereto.

Respectfully submitted this 10th day of April, 2002,

THE ZINSER LAW FIRM, P.C.



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VI. CERTIFICATE OF SERVICE

I hereby certify this 10th day of April, 2002, that I caused to be served a copy of the Brief in Support of Respondent's Exceptions to the Decision of the Administrative Law Judge via facsimile and Federal Express to the following:

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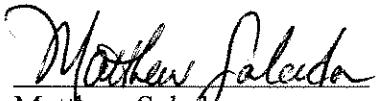
Respectfully,



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2001 Cal. App. LEXIS 3107, *; 2001 Cal. Daily Op. Service 10296;
2001 Daily Journal DAR 12793

A

INTEL CORPORATION, Plaintiff and Respondent, v. KOUROSH KENNETH HAMIDI, Defendant and Appellant.

C033076

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

2001 Cal. App. LEXIS 3107; 2001 Cal. Daily Op. Service 10296; 2001 Daily Journal DAR 12793

December 10, 2001, Filed

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Sacramento County. (Super. Ct. No. 98AS05067). John R. Lewis, Judge.

DISPOSITION: Affirmed.

COUNSEL: Philip H. Weber for Defendant and Appellant.

Ann Brick for American Civil Liberties Union Foundation of Northern California; Christopher A. Hansen for American Civil Liberties Union Foundation, New York; and Deborah Pierce for Electronic Frontier Foundation, Amici Curiae for Defendant and Appellant.

Morrison & Foerster, Linda E. Shostak, Michael A. Jacobs, and Kurt E. Springmann for Plaintiff and Respondent.

JUDGES: MORRISON, J. I concur: SCOTLAND, P.J., Dissenting Opinion of KOLKEY, J.

OPINIONBY: MORRISON

OPINION: After Kourosh Kenneth Hamidi was fired by Intel Corporation, he began to air grievances about the company. Hamidi repeatedly flooded Intel's e-mail system. When its security department was unable to block or otherwise end Hamidi's mass e-mails, Intel filed this action. The trial court issued a permanent injunction stopping the campaign, on a theory of trespass to chattels.

On appeal Hamidi, supported by Amici Curiae Electronic Frontier Foundation [*2] (EFF) and American Civil Liberties Union (ACLU), urges trespass to chattels was not proven and, even if it

was, the injunction violates free speech principles which require the elements of the tort be tempered in cases involving speech. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Intel filed a brief complaint, alleging it maintains an internal, proprietary, e-mail system for use of its employees; the e-mail addresses are confidential; defendant Hamidi and FACE-Intel (Former and Current Employees of Intel, a defaulting party which did not appeal) obtained Intel's e-mail address list and on several occasions sent e-mail to up to 29,000 employees; on March 17, 1998, Intel sent a letter demanding Hamidi stop, but he refused. The complaint sought remedies based on theories of nuisance and trespass to chattels.

Intel moved for summary judgment and submitted a set of undisputed facts which Hamidi did not dispute. They establish: Hamidi is the FACE-Intel webmaster and spokesperson. He sent e-mails to between 8,000 and 35,000 Intel employees on six specific occasions. He ignored Intel's request to stop and took steps to evade its security measures. Intel's employees "spend significant [*3] amounts of time attempting to block and remove HAMIDI's e-mail from the INTEL computer systems," which are governed by policies which "limit use of the e-mail system to company business."

Hamidi filed a declaration in opposition to summary judgment, explaining "FACE-INTEL was formed to provide a medium for INTEL employees to air their grievances and concerns over employment conditions at INTEL. FACE-INTEL provides an extremely important forum for employees within an international corporation to communicate via a web page on the Internet and via electronic mail, on common labor issues, that, due to geographical and other limitations, would not otherwise be possible." His six mass e-mailings "did not originate on INTEL property, nor were they sent to INTEL property. The electronic mails were sent over the internet to an internet server. [P] With each of the electronic mailings [he] informed each recipient that [he] would remove them from the mailing list upon request. [He] only received 450 requests[.]"

Intel dropped its nuisance theory and claim for damages, and the trial court granted summary judgment. It issued an injunction that "defendants, their agents, servants, [*4] assigns, employees, officers, directors, and all those acting in concert for or with defendants are hereby permanently restrained and enjoined from sending unsolicited e-mail to addresses on INTEL's computer systems." Hamidi timely appealed.

STANDARD OF REVIEW

We review the judgment de novo. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 860; Jackson v. Ryder Truck Rental, Inc. (1993) 16 Cal.App.4th 1830, 1836; see Code Civ. Proc., § 437c, subd. (c) & subd. (o)(2).)

DISCUSSION

I. Intel Proved Hamidi Trespassed to its Chattels

The common law adapts to human endeavor. For example, if rules developed through judicial decisions for railroads prove nonsensical for automobiles, courts have the ability and duty to change them. (See generally, Keller, Condemned to Repeat the Past: The Reemergence of Misappropriation and other Common Law Theories of Protection for Intellectual Property (1998) 11 Harv.J.L. & Tech. 401, 403-406, 423-426.)

Trespass to chattels is somewhat arcane and suffers from desuetude. "The chief importance of the theory today, according to Prosser, is that there [*5] may be recovery for interferences with the possession of personal property that are not sufficiently important to be classed as conversion, i.e., as a 'little brother of conversion.'" (5 Witkin, Summary of Cal. Law (9th ed. 1988, 1999 Supp.) Torts, § 627A, p. 390; see id., § 610, pp. 707-708.) However, the tort has reemerged as an important rule of cyberspace.

We begin with Prosser, who explains: "The earliest cases in which the action of trespass was applied to chattels involved asportation, or carrying off, and a special form of the writ, known as trespass de bonis asportatis, was devised to deal with such situations. Later the action was extended to include cases where the goods were damaged but not taken -- as where animals were killed or beaten. Later decisions extended the tort to include any direct and immediate intentional interference with a chattel in the possession of another. Thus, it is a trespass to damage goods or destroy them, to make an unpermitted use of them, or to move them from one place to another." (Prosser and Keeton, Torts (5th ed. 1984) Trespass to Chattels, § 14, p. 85, fns. omitted.)

Although there was litigation over who could bring suit and over [*6] formal pleading requirements, the shape of the tort is simple. A leading American court approved this definition: "1. To constitute a trespass, there must be a disturbance of the plaintiff's possession. 2. The disturbance may be by an actual taking, a physical seizing or taking hold of the goods, removing them from their owner, or by exercising a control or authority over them inconsistent with their owner's possession." (Holmes v. Doane (1850) 69 Mass. 328, 329.) The most common application is for a physical taking, even if momentary. (See Tubbs v. Delk (Mo.Ct.App. 1996) 932 S.W.2d 454 [taking camera for five minutes, returning it with film intact].)

The Restatement is in accord, providing "A trespass to a chattel may be committed by intentionally . . . (b) using or intermeddling with a chattel in the possession of another." (Rest.2d Torts, § 217, p. 417.) Most cases involve concrete harm to a chattel, "actual impairment of its physical condition, quality or value to the possessor . . . as distinguished from the mere affront to [the owner's] dignity as possessor[.]" (§ 218, com. h, p. 422 [allowing some exceptions, such as use of another's [*7] toothbrush].)

The Restatement also provides "The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor. Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest [is harmed.] Sufficient

legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference. [P] Illustration: [P] 2. A, a child, climbs upon the back of B's large dog and pulls its ears. No harm is done to the dog, or to any other legally protected interest of B. A is not [*8] liable to B." (§ 218, com. e, pp. 421-422; see Glidden v. Szybiak (1949) 95 N.H. 318, 320 63 A.2d 233, 235.) This caveat speaks of "nominal damages." Intel does not seek damages, even nominal damages, to compensate for Hamidi's conduct; Intel wants to prevent him from repeating his conduct. In this case, the nature of the remedy sought colors the analysis.

"Originally, all types of trespass, including trespass to land, were punishable under the criminal law because the trespasser's conduct was regarded as a breach of the peace. When the criminal and civil aspects of trespass were separated, the civil action for trespass was colored by its past, and the idea that the peace of the community was put in danger by the trespasser's conduct influenced the courts' ideas of the character of the tort. Therefore, relief was granted to the plaintiff where he was not actually damaged, partly, at least, as a means of discouraging disruptive influences in the community. If then, there is an act on the part of the defendant interfering with the plaintiff's possession, which does or is likely to result in arousing conflict between them, that act will characterize the tort as [*9] a trespass, assuming of course that the other elements of the tort are made out." (7 Speiser et al., American Law of Torts (1990) Trespass, § 23:1, p. 592 (Speiser).)

The treatise just quoted states "As a number of very early cases show, any unlawful interference, however slight, with the enjoyment by another of his personal property, is a trespass." (Speiser, supra, § 23:23, p. 667.) The oldest case cited is Rand v. Sargent (1843) 23 Me. 326. Actually, "chasing cattle has been a trespass time out of mind" (Winfield & Jolowicz on Tort (10th ed. 1975) Trespass to Goods, p. 403), or at least since Jacobean times. (Farmer v. Hunt (1610) 1 Brown. & Gold. 220 [123 Eng. Rep. 766; see 1 Chitty on Pleading (7th Ed. [16th Amer. Ed.] 1876) Trespass, p. *193 ["hunting or chasing sheep, & c."].)

"A trespass to chattels is actionable per se without any proof of actual damage. Any unauthorized touching or moving of a chattel is actionable at the suit of the possessor of it, even though no harm ensues. So it is a trespass for a shop assistant to snatch a customer's handbag and detain it 'for a few moments,' or to erase a tape-recording, or to [*10] show a private letter to an unauthorized person. . . . It may be very necessary for the protection of certain kinds of property, e.g., museum or art gallery exhibits, that this should be the law. Hence, the successful plaintiff will always be entitled to nominal damages at least[.]" (Salmond on Tort (21st ed. 1996) Trespass to Goods, § 6.2, p. 95, fns. omitted.) Another treatise agrees that "any unpermitted contact with or impact upon another's chattel" is enough, but comments "Probably the courts will hold that direct and deliberate interference is trespass even if no damage ensues, but where the interference is by way of negligent or inadvertent contact, the general trend of recent judicial decisions and dicta in England suggest that there is a requirement of proof of special damage[.]" (Clerk & Lindsell on Torts (17th ed. 1995) Trespass, P 13-159, p. 703, italics added; see Fleming, Law of Torts (9th ed. 1998) Intentional Interference with Chattels, pp. 58-59 [questioning rule, but suggesting damage "however slight," would suffice, and acknowledging mere use of another's goods sufficed].)

As indicated, some confusion in the cases and treatises disappears when the [*11] nature of the remedy is considered. We accept that "The plaintiff, in order to recover more than nominal damages, must prove the value of the property taken, or that he has sustained some special damage." (1 Waterman, Trespass (1875) Remedy for Wrongful Taking of Property, § 596, p. 617; see Lay v. Bayless (1867) 44 Tenn. 246, 247; Warner v. Capps (1881) 37 Ark. 32.) Intel seeks no damages.

Hamidi's conduct was trespassory. Even assuming Intel has not demonstrated sufficient "harm" to trigger entitlement to nominal damages for past breaches of decorum by Hamidi, it showed he was disrupting its business by using its property and therefore is entitled to injunctive relief based on a theory of trespass to chattels. Hamidi acknowledges Intel's right to self help and urges Intel could take further steps to fend off his e-mails. He has shown he will try to evade Intel's security. We conceive of no public benefit from this wasteful cat-and-mouse game which justifies depriving Intel of an injunction. (Cf. America Online, Inc. v. Nat. Health Care Discount, Inc. (N.D. Iowa 2000) 121 F. Supp. 2d 1255, 1259-1260 [detailing ongoing technological [*12] struggle between spammers and system operators].) Even where a company cannot precisely measure the harm caused by an unwelcome intrusion, the fact the intrusion occurs supports a claim for trespass to chattels. (See Register.com, Inc. v. Verio, Inc. (S.D.N.Y. 2000) 126 F. Supp. 2d 238, 249-250 [applying New York law, based on the Restatement, "evidence of mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels"].)

Some commentators espouse the view that "cyberspace," as they term it, is necessarily free and open, minimizing the harm caused to Intel's business. (E.g., Comment, Developments -- the Law of Cyberspace (1999) 112 Harv.L.Rev. 1574, 1633, fn. 137.) And Amicus ACLU urges "Harm flowing from the content of the communication may not form the basis for an action for trespass to chattel." But Intel proved more than its displeasure with Hamidi's message, it showed it was hurt by the loss of productivity caused by the thousands of employees distracted from their work and by the time its security department spent trying to halt the distractions after Hamidi refused to respect [*13] Intel's request to stop invading its internal, proprietary e-mail system by sending unwanted e-mails to thousands of Intel's employees on the system. (See Hotmail Corporation v. Van$ Money Pie, Inc. (N.D.Cal. 1998) 1998 U.S. Dist. LEXIS 10729, 47 U.S.P.Q.2d 1020, _____ [1998 WL 388389, P 39 (Hotmail) [trespass caused "added costs for personnel"].)

"'Intermeddling' means intentionally bringing about a physical contact with the chattel." (Rest.2d Torts, § 217, com. e, p. 419.) "Electronic signals generated and sent by computer have been held to be sufficiently physically tangible to support a trespass cause of action. [Citations.] It is undisputed that plaintiff has a possessory interest in its computer systems. Further, defendants' contact with plaintiff's computers is clearly intentional. Although electronic messages may travel through the Internet over various routes, the messages are affirmatively directed to their destination." (CompuServe Inc. v. Cyber Promotions Inc. (S.D. Ohio 1997) 962 F. Supp. 1015, 1021 (CompuServe).) "Any value CompuServe realizes from its computer equipment is wholly derived from the extent to [*14] which that equipment can service its subscriber base . . . . To the extent that defendants' multitudinous electronic mailings demand the disk space and drain the processing power of plaintiff's computer equipment, those resources are not available to serve

CompuServe subscribers. Therefore, the value of that equipment to CompuServe is diminished even though it is not physically damaged by defendants' conduct." (Id. at p. 1022.)

Amicus ACLU seeks to distinguish CompuServe on the ground the conduct "placed 'a tremendous burden' on CompuServe's equipment thus depriving CompuServe of the full use of its equipment." Elsewhere in its brief, ACLU states Hamidi did not send "a large number of e-mails. All in all, he sent a total of only six e-mails over a period spanning close to two years." Similarly, Amicus EFF states: "Assuming the veracity of Intel's allegations, on six occasions over a nearly two-year period, many Intel employees simply had one additional e-mail from Mr. Hamidi sitting in their in boxes when they came to work in the morning. This hardly constitutes physical disruption to Intel's computer system." Amici discount disruption to Intel's business [*15] system, inasmuch as the thousands of employees had to confront, read, and delete the messages even if only to tell Hamidi to send them no more, as several hundred did.

EFF states if such loss of productivity "is the applicable standard [of harm], then every personal e-mail that an employee reads at work could constitute a trespass." The answer is, where the employer has told the sender the entry is unwanted and the sender persists, the employer's petition for redress is proper. Strangely, EFF, purporting to laud the "freedom" of the Internet, emphasizes Intel allows its employees reasonable personal use of Intel's equipment for sending and receiving personal e-mail. Such tolerance by employers would vanish if they had no way to limit such personal usage of company equipment.

CompuServe relied in part on Thrifty-Tel, Inc. v. Bezenek (1996) 46 Cal.App.4th 1559 (Thrifty-Tel). Thrifty-Tel held the unauthorized use of telephone access numbers, which "overburdened the system, denying some subscribers access," (p. 1564) was sufficient to support liability for actual monetary damages. The case did not state or imply that such an extreme effect was required [*16] to establish the tort. Thrifty-Tel noted: "At early common law, trespass required a physical touching of another's chattel or entry onto another's land. The modern rule recognizes an indirect touching or entry; e.g., dust particles from a cement plant that migrate onto another's real and personal property may give rise to trespass. [Citing, inter alia, Wilson v. Interlake Steel Co. (1982) 32 Cal.3d 229, 185 Cal. Rptr. 280, 649 P.2d 922 (Wilson).] But the requirement of a tangible trespass has been relaxed almost to the point of being discarded. Thus, some courts have held that microscopic particles [citation] or smoke [citation] may give rise to trespass. And the California Supreme Court has intimated migrating intangibles (e.g., sound waves) may result in a trespass, provided they do not simply impede an owner's use or enjoyment of property, but cause damage. [Citing Wilson.] In our view, the electronic signals generated by the Bezenek boys' activities were sufficiently tangible to support a trespass cause of action." (46 Cal.App.4th at p. 1566, fn. 6.) We agree.

Amicus EFF suggests Thrifty-Tel, supra, 46 Cal.App.4th 1559 [*17] is based on the view "physical damages or physical disruption, even if temporary," "gives the 'electronic signal' a sufficiently tangible quality to support a cause of action for trespass," and Intel has not shown Hamidi's e-mails caused physical disruption. This is not so for two reasons. First, the footnote just quoted makes it plain that the electronic signal is "sufficiently tangible to support a trespass cause of action." The tangibility of the contact is not dependent on the harm caused. Second, Hamidi's e-mails caused disruption to Intel's workers, who were drawn away from their jobs to

deal with the messages. If EFF is saying Hamidi can flood Intel's system to the penultimate extent before causing a computer crash, we disagree.

Hamidi insists this view of the Thrifty-Tel decision (supra, 46 Cal.App.4th 1559) has been undermined by a subsequent California Supreme Court case, San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal.4th 893, 920 P.2d 669 (San Diego Gas). We disagree. San Diego Gas held a civil action claiming damages from electromagnetic radiation emanating from power lines would not lie, as such a suit would [*18] trench on the jurisdiction of the Public Utilities Commission. The plaintiffs effectively abandoned their claim of personal injury, based on a fear of cancer, but pursued a trespass claim. (Id. at p. 935.) The court reiterated the rule stated by the late Justice Frank K. Richardson, as follows: "'Noise alone, without damage to the property, will not support a tort action for trespass. Recovery allowed in prior trespass actions predicated upon noise, gas emissions, or vibration intrusions has, in each instance, been predicated upon the deposit of particulate matter upon the plaintiffs' property or on actual physical damage thereto. [Citations.] [P] All intangible intrusions, such as noise, odor, or light alone, are dealt with as nuisance cases, not trespass. [Citations.] [P] Succinctly stated, the rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion. . . .'" (Id. at p. 936, quoting Wilson, supra, 32 Cal.3d 229.) Wilson and San Diego Gas involved claims of damage to realty, not chattels. Most importantly, San Diego Gas, quoting from Wilson, spoke of "nondamaging" [*19] intrusions. In other words, it did not hold that the electromagnetic waves did not contact the land. Cases are not authority for points not considered. (Hart v. Burnett (1860) 15 Cal. 530, 598.)

In America Online, Inc. v. IMS (E.D.Va. 1998) 24 F. Supp. 2d 548, IMS "sent unauthorized bulk e-mail advertisements ('spam') to AOL subscribers," even after AOL told IMS to stop. (Id. at p. 549.) Applying the common law of Virginia, the court granted summary judgment to AOL on its claim of trespass to chattels. The court relied in part on CompuServe to conclude AOL was harmed by the time spent processing the unwanted e-mail, and the burden to the computer equipment it caused. (Id. at p. 550; accord America Online, Inc. v. GreatDeals.Net (E.D. Va. 1999) 49 F. Supp. 2d 851, 864.) In America Online, Inc. v. LCGM, Inc. (E.D.Va. 1998) 46 F. Supp. 2d 444, another judge of the same court held (at page 452): "The transmission of electrical signals through a computer network is sufficiently 'physical' contact to constitute a trespass to property."

Quite recently, a California federal [*20] court reached a similar conclusion in e Bay Inc. v. Bidder's Edge, Inc. (N.D.Cal. 2000) 100 F. Supp. 2d 1058, 1071: "Even if, as BE argues, its searches use only a small amount of eBay's computer system capacity, BE has nonetheless deprived eBay of the ability to use that portion of its personal property for its own purposes. The law recognizes no such right to use another's personal property."

Hamidi and EFF ask, if unwanted e-mail can constitute a trespass, why isn't unwanted first-class mail a trespass? "'The short, though regular journey from mailbox to trash can . . . is an acceptable burden, at least as far as the Constitution is concerned.'" (Bolger v. Youngs Drug Products Corp. (1983) 463 U.S. 60, 72 77 L. Ed. 2d 469, 481, 103 S. Ct. 2875 [held, law against use of mail for advertising contraceptives invalid].) The issue is one of degree. As Hamidi impliedly concedes, he could not lawfully cause Intel's computers to crash, or overwhelm the

system so that Intel's employees were unable to use the computer system. (See Hotmail, supra, 47 U.S.P.Q.2d at p. ____ [1998 WL 388389, P 39 [threat to "fill[] up Hotmail's computer [*21] storage space and . . . damage Hotmail's ability to service its legitimate customers]"].) Nor could a person send thousands of unwanted letters to a company, nor make thousands of unwelcome telephone calls. (See Rowan v. United States Post Office (1970) 397 U.S. 728, 736-737 25 L. Ed. 2d 736, 743, 90 S. Ct. 1484 [upholding statute allowing blocking of mail, "Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know"; "To hold less would tend to license a form of trespass"].)

At oral argument counsel referred to Business and Professions Code section 17538.4, which prohibits entities from barraging a person or company with unwanted commercial e-mails. The statute shows the Legislature recognizes the distraction and harm caused by unwanted electronic communications. Nothing in the statute suggests any intent to eliminate the application of common law remedies, such as trespass to chattels, to electronic communications, nor to limit common law remedies to cases of commercial speech.

We conclude the summary judgment moving papers demonstrated Intel's entitlement to an injunction [*22] based on a theory of trespass to chattels.

II. The Injunction Comports with the Federal Constitution

Hamidi and Amici insist the injunction runs afoul of the First Amendment. In like manner as the First Amendment trumps a state's power to make and enforce defamation torts (e.g., New York Times v. Sullivan (1964) 376 U.S. 254 11 L. Ed. 2d 686, 84 S. Ct. 710 (Sullivan)) they urge it governs a state's power to enjoin e-mails. This lawsuit does not implicate federal constitutional rights, for lack of state action.

Sullivan famously held "actual malice" was an element of the tort of libel -- as a matter of federal constitutional law -- in a case where a political figure sued a newspaper. Sullivan pit common law rights protecting reputation against the constitutional right of a newspaper to publish. In a trespass case, however, the speaker's rights are pitted against a property owner's rights -- of at least equal constitutional force -- to wisely govern his lands (or, in this case, his chattels). The equation is different. (376 U.S. 254 11 L. Ed. 2d 686, 84 S. Ct. 710.)

"The First Amendment protects individuals only from government, [*23] not private, infringements upon speech rights." (George v. Pacific-CSC Work Furlough (9th Cir. 1996) 91 F.3d 1227, 1229.) When individuals seek protection for expressive rights, the "courts must first determine whether it is indeed government action -- state or federal -- that the litigants are challenging." (Tribe, American Constitutional Law (2d ed. 1988) The Problem of State Action, § 18-1, p. 1688 (Tribe).) The case law is muddled. (See id., at p. 1690.) However, in some cases, including speech cases, a state-court decision in a suit between private litigants implicates federal concerns and "there seems little doubt that judges are government actors and that judicial remedies are state action." (Chemerinsky, State Action (1999) 618 PLI/Lit 183, 209 (Chemerinsky).)

Krishna Consciousness, Inc. v. Reber (C.D. Cal. 1978) 454 F. Supp. 1385, 1388-1389; see Cape Cod Nursing Home v. Rambling Rose Rest Home (1st Cir. 1981) 667 F.2d 238, 243 [police assistance in removing unwelcome guests does not create state action], followed by Radich v. Goode (3d Cir. 1989) 886 F.2d 1391, 1398-1399.) "As exclusivity is an attribute of private property, the owner may use the neutral trespass laws to enforce his decision so long as he has no other connection to state action." (2 Rotunda & Nowak, Treatise on Constitutional Law (3d ed. 1999) State Action, § 16.3, p. 786; cf. Comment, Maintaining Racial Segregation through State Criminal Trespass Actions (1963) 77 Harv.L.Rev. 727.)

Amicus ACLU cites cases which confer First Amendment protection in private tort actions, but they differ from the present case in that Hamidi was enjoined from trespassing onto Intel's private property. (NAACP v. Claiborne Hardware Co. (1982) 458 U.S. 886 73 L. Ed. 2d 1215, 102 S. Ct. 3409 [*28] [boycott activity]; Organization for a Better Austin v. Keefe (1971) 402 U.S. 415 29 L. Ed. 2d 1, 91 S. Ct. 1575 (Keefe) [leafleting]; Blatty v. New York Times (1986) 42 Cal.3d 1033, 232 Cal. Rptr. 542, 728 P.2d 1177 [newspaper's bestseller list]; Paradise Hills Associates v. Procel (1991) 235 Cal. App. 3d 1528 (Paradise Hills).) None of these cases hold the First Amendment permits trespassing. Paradise Hills reversed an injunction preventing a disgruntled homebuyer from protesting, but explains, had she "entered private property not open for public access, an injunction against such conduct would be appropriate." (Id. at p. 1547.)

Cohen v. Cowles Media Co. (1991) 501 U.S. 663 115 L. Ed. 2d 586, 111 S. Ct. 2513, cited by Hamidi, involved a newspaper's breach of promise to a source; liability was not precluded by the First Amendment. The case did not address trespass.

Recent cases involving unwanted commercial e-mail support our view. In Cyber Promotions v. American Online, Inc. (E.D. Pa. 1996) 948 F. Supp. 436 (Cyber Promotions), the court found no [*29] state action when an online company obtained an injunction to prevent another company from sending commercial e-mail to its members. The court rejected the e-mail sender's position that "'the Court's participation with the litigant in issuing or enforcing an order which impinges on another's First Amendment rights'" amounted to state action. (Id. at pp. 444-445.) CompuServe, which upheld an injunction against a company sending unsolicited e-mails, held squarely: "the mere judicial enforcement of neutral trespass laws by the private owner of property does not alone render it a state actor." (CompuServe, supra, 962 F. Supp. at p. 1026, cited on this point with approval Golden Gateway Center v. Golden Gateway Tenants Assn. (2001) 26 Cal. 4th 1013, 1034 & fn. 14 (plu. opn.) ["judicial enforcement of injunctive relief does not, by itself, constitute state action] (Golden Gateway).) We agree.

At oral argument counsel asserted the California Supreme Court has held any judicial tort relief implicating expressive rights constitutes state action, relying on the following passage in Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092 at page 1114, 252 Cal. Rptr. 122, 762 P.2d 46: [*30] "While judicial sanctioning of tort recovery constitutes state action sufficient to invoke the same constitutional protections applicable to statutes and other legislative actions [citing Sullivan], religious groups are not immune from all tort liability." That case involved claims by former cult members alleging that a religious group defrauded and falsely imprisoned them. The point of the passage just quoted was to emphasize that not all activities by religious groups are

insulated from tort liability. Counsel's interpretation of the passage is tenable only if the language is divorced from its context.

For lack of state action the federal constitution is not implicated herein. Intel has the right to exclude others from speaking on its property. Intel is not required to exercise its right in a "content-neutral" fashion. Content discrimination is part of a private property-owner's bundle of rights. Intel does not welcome Hamidi.

III. The Injunction Comports with the State Constitution

Hamidi contends his right to send e-mail to Intel employees is protected by the California analog to the First Amendment, which provides "Every person may freely speak, write or publish [*31] his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2, subd. (a).) This provision is "more definitive and inclusive than the First Amendment[.]" (Wilson v. Superior Court (1975) 13 Cal.3d 652, 658, 119 Cal. Rptr. 468, 532 P.2d 116.)

In a controversial 4-3 decision, over a vigorous dissent, the California Supreme Court held the free speech rights of students obtaining petition signatures trumped the right of the owner of a shopping center to exclude them. (Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (Robins), affd. sub nom. Pruneyard Shopping Center v. Robins (1980) 447 U.S. 74 64 L. Ed. 2d 741, 100 S. Ct. 2035.) Robins concluded the shopping center served as a "functional equivalent for the suburban counterpart of the traditional town center business block, where historically the public's First Amendment activity was exercised and its right to do so was scrupulously guarded." (Planned Parenthood v. Wilson (1991) 234 Cal. App. 3d 1662, 1670, 286 Cal. Rptr. 427 [*32] (Planned Parenthood).) Robins rejected contrary authority construing the First Amendment on similar facts. (Lloyd, supra, 407 U.S. 551 [33 L. Ed. 2d 131.) Even under Robins, a large shopping center may impose time, place and manner restrictions. (Union of Needletrades, etc. Employees v. Superior Court (1997) 56 Cal.App.4th 996, 1009-1010.)

But, "by no means do we imply that those who wish to disseminate ideas have free rein. . . . 'It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment.'" (Robins, supra, 23 Cal.3d at p. 910.) Robins only diminishes a private property owner's right to exclude others where the property "is generally open to the public and functions as the equivalent of a traditional public forum[.]" (Allred v. Harris (1993) 14 Cal.App.4th 1386, 1390.)

The California Supreme Court recently reaffirmed the Robins holding. In Golden Gateway, supra, 26 Cal.4th 1013, a majority concluded a large residential apartment complex could prevent its tenants [*33] from distributing leaflets within the complex. The plurality opinion of three justices would import the "state action" limitation into lawsuits based on the California Constitution's analog to the First Amendment. Three justices disagreed with this view and the Chief Justice declined to resolve the point. For our purposes we need not enter into that debate. Instead, we distill from Golden Gateway a holding which reaffirms the test employed in Robins. According to the plurality, "the actions of a private property owner constitute state action for

purposes of California's free speech clause only if the property is freely and openly accessible to the public." (26 Cal.4th at p. 1033 [slip opn. at p. 26].) Because the plurality concluded the complex was not freely and openly accessible to the public, it found no state action. The Chief Justice's opinion proceeds directly to the question whether the complex was "freely open" to the public and concluded it was not. (Id. at p. 1036 [slip. opn. at p. __.) We perceive no semantic difference between "freely open" and "freely and openly accessible" to the public. Therefore actions to halt expressive activity [*34] on one's private property do not contravene the California Constitution unless the property is freely open to the public.

We recognize the open character of the Internet. "Although in its infancy, the Internet has already become a popular place of public discussion. Individuals from every part of American society visit and exchange ideas with others through various forums within cyberspace. The debate occurring in these forums in many ways embodies the Court's ideal of 'uninhibited, robust, and wide-open' discussion." (Goldstone, A Funny Thing Happened on the Way to the Cyber Forum: Public vs. Private in Cyberspace Speech (1998) 69 U. Colo. L. Rev. 1, 3.)

Private e-mail servers differ from the Internet; they are not traditional public forums. (Cyber Promotions, supra, 948 F. Supp. at p. 446.) Nor is a private company which chooses to use e-mail made a public forum.

Although Intel is a large company, it is not like a Pruneyard Shopping Center, in that it is not a place where the public gathers to engage in expressive activity such as gathering signatures to petition the government, nor is its e-mail system so used. The Intel e-mail system is private [*35] property used for business purposes. Intel's system is not transformed into a public forum merely because it permits some personal use by employees. (See Perry Education Association v. Perry Local Educators' Assn. (1983) 460 U.S. 37, 47 74 L. Ed. 2d 794, 806, 103 S. Ct. 948 [limited access to outside organizations does not transform school mailbox system into a public forum].) Intel invites the public to use its e-mail system for and only for business purposes.

Hamidi insists Intel's act of connecting itself (and thus, its employees) to the Internet and giving its employees e-mail addresses makes Intel's e-mails a public forum. By the same reasoning, connecting one's realty to the general system of roads invites demonstrators to use the property as a public forum and buying a telephone is an invitation to receive thousands of unwanted calls. That is not the law. (CompuServe, supra, 962 F. Supp. at p. 1024; Cyber Promotions, supra, 948 F. Supp. at p. 442.) Intel is as much entitled to control its e-mail system as it is to guard its factories and hallways. No citizen has the general right to enter a private business and pester an employee [*36] trying to work. It may be a few unwanted e-mails would not be sufficient to trigger a court's equity powers. Indeed, such may be an inevitable, though regrettable, fact of modern life, like unwelcome junk mail and telephone solicitations. (See Cyber Promotions, Inc. v. Apex Global Information Svcs., Inc. (E.D.Pa. 1997) 1997 WL 634384, p. *3 [bulk e-mail "annoying and intrusive"].) However, the massive size of Hamidi's campaign caused Intel much trouble, not the least of which was caused by the lost time of each employee who had to read or delete an unwanted message, either out of fear of a virus or a lack of desire to communicate with Hamidi. As we pointed out in another case, "When a camel's back is broken we need not weigh each straw in its load to see which one could have done the deed." (Woodland Joint Unified School Dist. v. Commission on Professional Competence (1992) 2 Cal.App.4th 1429, 1457.)

Finally, Hamidi has many available alternate ways to reach his target audience. (Cf. Chico Feminist Women's Health Center v. Scully (1989) 208 Cal. App. 3d 230, 243-248, 256 Cal. Rptr. 194. Cf. also Golden Gateway, supra, 26 Cal.4th at p. 1050 [*37] (dis. opn.) [concluding use of mail and off-site distribution were not feasible alternatives to door-to-door leafleting].)

We may safely assume most, if not all, Intel employees can reach Hamidi's website, either from their homes or from libraries or cafes which provide Internet access. Hamidi concedes the Internet has become widely accessible and affordable, at least in the United States. Employees who cannot get on the Internet can correspond with Hamidi about issues of mutual concern. According to Hamidi's website, <www.faceintel.com>, he has delivered many thousands of printed "e-mails" to Intel's headquarters by horse and buggy, both to communicate with its workers within the terms of the injunction, and to publicize this lawsuit. (See www.intelhamidi.com/seconddelivery.htm. See also Gaura, E-Mail Delivered by Horse-Mail, S.F. Chron. (Sep. 29, 1999) p. B-2 ["Mounted as an outrider and dressed in a red shirt and star-spangled kerchief, Hamidi handed 16 boxes of messages to Intel security officials"].) Hamidi may freely exchange ideas with Intel or Intel workers. This highlights a critical factual misstatement in Hamidi's brief, that he has been enjoined "from sending e-mail [*38] over the internet to Intel employees." The injunction prohibits Hamidi "from sending unsolicited e-mails to addresses on INTEL's computer systems." Hamidi is free to send mail -- "e" or otherwise -- to the homes of Intel employees, and is free to send them regular mail. The injunction simply requires that Hamidi air his views without using Intel's private property.

The Chief Justice has cautioned that imposing a state action limitation on the free expression provisions of the California Constitution could allow a private actor "to censor or undermine what might be viewed as another individual's 'core' free speech rights." (Golden Gateway, supra, 26 Cal.4th at p. 1042.) He poses the example of an employer forbidding employees from displaying union bumper stickers in the employer's parking lot. (Ibid.)

That is not this case. Although Intel's workers may communicate with each other and outsiders to air grievances, they do not have a "core" right to spend company time doing so, such as by laying aside their work in order to respond to Hamidi's e-mails. Tellingly, ACLU views the e-mails to be in the control of the employees: "The decision whether or not to continue [*39] receiving Hamidi's messages should be that of the employee, not Intel." Hamidi states "Hamidi's e-mails may have been uninvited by Intel management, but they were not directed to Intel management." Intel owns the e-mail system it provides to its workers as much as it owns the telephones and manufacturing equipment it provides. The ACLU's position would result in employers denying all personal access to the Internet, which is not a sensible outcome.

We conclude the injunction does not violate the California Constitution.

DISPOSITION

The judgment is affirmed.

MORRISON, J.

I concur:

SCOTLAND, P.J.

DISSENTBY: KOLKEY

DISSENT: Dissenting Opinion of KOLKEY, J.

I respectfully dissent. The majority would apply the tort of trespass to chattel to the transmittal of unsolicited electronic mail that causes no harm to the private computer system that receives it by modifying the tort to dispense with any need for injury, or by deeming the mere reading of an unsolicited e-mail to constitute the requisite injury. (Maj. opn. at pp. 9-10.)

While common law doctrines do evolve to adapt to new circumstances, it is not too much to ask that trespass to chattel continue to [*40] require some injury to the chattel (or at least to the possessory interest in the chattel) in order to maintain the action. The only injury claimed here -- the time spent reading an e-mail -- goes beyond any injury associated with the chattel or within the tort's zone of protection. Although I understand Intel's desire to end what it deems harassment by a disgruntled former employee, "we must not throw to the winds the advantages of consistency and uniformity to do justice in the instance. We must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through centuries of the common law have set to judge-made innovations." (Cardozo, The Nature of the Judicial Process (1921), p. 103, fn. omitted.)

The other appellate decisions that have applied trespass to chattel to computer systems have done so only where the transmittal of the unsolicited bulk e-mail burdened the computer equipment, thereby interfering with its operation and diminishing the chattel's value (e.g., America Online, Inc. v. IMS (E.D. Va. 1998) 24 F. Supp. 2d 548, 550-551; America Online, Inc. v. LCGM, Inc. (E.D. Va. 1998) 46 F. Supp. 2d 444, 449; [*41] CompuServe, Inc. v. Cyber Promotions, Inc. (S.D. Ohio 1997) 962 F. Supp. 1015), or where the unauthorized search of, and retrieval of information from, another party's database reduced the computer system's capacity, slowing response times and reducing system performance (Register.com, Inc. v. Verio, Inc. (S.D.N.Y. 2000) 126 F. Supp. 2d 238, 250; e Bay, Inc. v. Bidder's Edge, Inc. (N.D. Cal. 2000) 100 F. Supp. 2d 1058, 1066, 1071). But no case has held that the requisite injury for trespass to chattel can consist of the mere receipt of an e-mail, the only damage from which consists of the time consumed to read it -- assuming the recipient chooses to do so. To apply this tort to electronic signals that do not damage or interfere with the value or operation of the chattel would expand the tort of trespass to chattel in untold ways and to unanticipated circumstances.

A

California cases have consistently required actual injury as an element of the tort of trespass to chattel. (Zaslow v. Kroenert (1946) 29 Cal.2d 541, 551, 176 P.2d 1; Thrifty-Tel, Inc. v. Bezenek

(1996) 46 Cal.App.4th 1559, 1566; [*42] Itano v. Colonial Yacht Anchorage (1968) 267 Cal. App. 2d 84, 90, 72 Cal. Rptr. 823.)

As most recently defined by the Court of Appeal in Thrift-Tel, Inc. v. Bezenek, supra, "trespass to chattel, although seldom employed as a tort theory in California . . .,lies where an intentional interference with the possession of personal property has proximately caused injury." (Thrift-Tel, Inc. v. Bezenek, supra, 46 Cal.App.4th at p. 1566, fn. omitted.) This definition was derived from Itano v. Colonial Yacht Anchorage, supra, 267 Cal. App. 2d at page 90, which, in turn, relied on Prosser's treatise on torts (Prosser) and the California Supreme Court's decisions in Jordan v. Talbot (1961) 55 Cal.2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20, and Zaslow v. Kroenert, supra, 29 Cal.2d at page 551, which themselves relied on Prosser. Accordingly, I turn to Prosser to clarify the elements of the tort.

The present edition of Prosser cautions that trespass to chattel requires actual damage before the trespass is actionable: "Another departure from the original rule of the old writ of trespass concerns [*43] the necessity of some actual damage to the chattel before the action can be maintained. Where the defendant merely interferes without doing any harm -- as where, for example, he merely lays hands upon the plaintiff's horse, or sits in his car -- there has been a division of opinion among the writers, and a surprising dearth of authority. . . . Such scanty authority as there is, however, has considered that the dignitary interest in the violability of chattels, unlike that as to land, is not sufficiently important to require any greater defense than the privilege of using reasonable force when necessary to protect them. Accordingly, it has been held that nominal damages will not be awarded, and that in the absence of any actual damage the action will not lie. This must be qualified, however, to the extent that any loss of possession by the plaintiff is regarded as necessarily a loss of something of value, even if only for a brief interval -- so that wherever there is found to be dispossession, as in the case of seizure of goods on execution, the requirement of actual damage is satisfied. . . ." (Prosser and Keeton on Torts (5th ed. 1984) § 14, p. 87, fns. omitted.)

The Restatement [*44] Second of Torts agrees on the need for actual damage for the tort to lie: "The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor. Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected as stated in Clause (c). . . ." (Rest.2d Torts, § 218, com. e, pp. 421-422.) n1

- - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 The full text of section 218, including clause (c), is found at pages 5-6, post.

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [*45]

For that reason, where a child climbs on the back of another's dog and pulls its ears, but no harm is done to the dog or to the legally protected interest of the owner, the child is not liable. (Glidden v. Szybiak (1949) 63 A.2d 233, 95 N.H. 318; Rest.2d Torts, § 218, com. e, illus. 2, p. 422.) On the other hand, the intermeddling is actionable where the trespass impairs the value of the chattel, even if its physical condition is unaffected. (Rest.2d Torts, § 218, com. h, p. 422.) For instance, "the use of a toothbrush by someone else . . . leads a person of ordinary sensibilities to regard the article as utterly incapable of further use by him." (Ibid.)

The only possible exception to the requirement of actual injury is where there has been a loss of possession, which is viewed as a loss of something of value and thus actual damage: According to comment d of section 218 of the Restatement Second of Torts, "where the trespass to the chattel is a dispossession, the action will lie although there has been no impairment of the condition, quality, or value of the chattel, and no other harm to any interest of the possessor." (Rest.2d Torts, § 218, com. d, p. 421.) [*46] This conforms with the observation in Prosser that "loss of possession by the plaintiff is regarded as necessarily a loss of something of value, even if only for a brief interval -- so that wherever there is found to be dispossession . . .,the requirement of actual damage is satisfied." (Prosser and Keeton on Torts, supra, § 14, p. 87, fns. omitted.)

Accordingly, in conformity with the California cases, section 218 of the Restatement Second of Torts requires actual injury in order to state a cause of action for trespass to chattel -- unless there is a loss of possession, which is deemed to constitute actual damage: "One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if, [P] (a) he dispossesses the other of the chattel, or [P] (b) the chattel is impaired as to its condition, quality, or value, or [P] (c) the possessor is deprived of the use of the chattel for a substantial time, or [P] (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest." (Rest.2d Torts, § 218, p. 420.)

B

In this case, however, Intel was not [*47] dispossessed, even temporarily, of its e-mail system by reason of receipt of e-mails; the e-mail system was not impaired as to its condition, quality, or value; and no actual harm was caused to a person or thing in which Intel had a legally protected interest.

The majority nonetheless suggests that "even assuming Intel has not demonstrated sufficient 'harm' to trigger entitlement to nominal damages . . . it showed [the defendant] was disrupting its business by using its property and therefore is entitled to injunctive relief based on a theory of trespass to chattels." (Maj. opn. at p. 9.)

However, if the defendant's earlier transmittals of e-mail did not constitute harm, it is hard to understand what cognizable injury the injunction is designed to avoid. The fact the relief sought is injunctive does not excuse a showing of injury, whether actual or threatened. After all, injunctive relief requires a "showing that the defendant's wrongful act constitutes an actual or threatened injury to property or personal rights that cannot be compensated by an ordinary damage award." (5 Witkin, California Procedure (4th ed. 1997) Pleading § 782, p. 239.) The

majority therefore cannot avoid [*48] the element of injury by relying on the fact that injunctive relief is sought here.

Alternatively, the majority suggests that injury resulted from defendant's e-mails, because Intel "was hurt by the loss of productivity caused by the thousands of employees distracted from their work [by the e-mails] and by the time its security department spent trying to halt the distractions after [defendant] refused to respect Intel's request to stop sending unwanted e-mails." (Maj. opn. at p. 10.)

But considering first Intel's efforts to stop the e-mails, it is circular to premise the damage element of a tort solely upon the steps taken to prevent the damage. Injury can only be established by the completed tort's consequences, not by the cost of the steps taken to avoid the injury and prevent the tort; otherwise, we can create injury for every supposed tort.

Nor can a loss of employees' productivity (by having to read an unwanted e-mail on six different occasions over a nearly two-year period) qualify as injury of the type that gives rise to a trespass to chattel. If that is injury, then every unsolicited communication that does not further the business's objectives (including telephone [*49] calls) interferes with the chattel to which the communication is directed simply because it must be read or heard, distracting the recipient. "Damage" of this nature -- the distraction of reading or listening to an unsolicited communication -- is not within the scope of the injury against which the trespass-to-chattel tort protects, and indeed trivializes it. After all, "the property interest protected by the old action of trespass was that of possession; and this has continued to affect the character of the action." (Prosser and Keeton on Torts, supra, § 14, p. 87.) Reading an e-mail transmitted to equipment designed to receive it, in and of itself, does not affect the possessory interest in the equipment.

Indeed, if a chattel's receipt of an electronic communication constitutes a trespass to that chattel, then not only are unsolicited telephone calls and faxes trespasses to chattel, but unwelcome radio waves and television signals also constitute a trespass to chattel every time the viewer inadvertently sees or hears the unwanted program.

At oral argument, Intel's counsel argued that the latter cases can be distinguished because Intel gave defendant notice of its objection [*50] before his final set of e-mails in September 1998. But such a notice could also be given to television and radio stations, telephone callers, and correspondents. Under Intel's theory, even lovers' quarrels could turn into trespass suits by reason of the receipt of unsolicited letters or calls from the jilted lover. Imagine what happens after the angry lover tells her fiance not to call again and violently hangs up the phone. Fifteen minutes later the phone rings. Her fiance wishing to make up? No, trespass to chattel.

No case goes so far as to hold that reading an unsolicited message transmitted to a computer screen constitutes an injury that forms the basis for trespass to chattel. This case can be distinguished from cases like CompuServe Incorporated v. Cyber Promotions, Inc., supra, 962 F. Supp. at page 1022, America Online, Inc. v. IMS, supra, 24 F. Supp. 2d 548, and America Online, Inc. v. LCGM, Inc., supra, 46 F. Supp. 2d at page 449, where the district court found that unauthorized bulk e-mail advertisements (spam) to subscribers of an online service constituted trespass to chattels because the massive mailings "burdened [its] [*51] equipment" and

diminished its good will and its possessory interest in its computer network. (America Online, Inc. v. IMS, supra, 24 F. Supp. 2d at p. 550-551.) In CompuServe Incorporated v. Cyber Promotions, Inc., supra, 962 F. Supp. at page 1022, for instance, the court found that the defendants' "multitudinous electronic mailings demanded the disk space and drained the processing power of plaintiff's computer equipment, [making] those resources . . . not available to serve CompuServe subscribers" and led subscribers to terminate their accounts, harming CompuServe's business reputation and good will with its customers. (962 F. Supp. at pp. 1022, 1023.) Clearly, the defendants' bulk mailings injured the operation and value of the system.

Likewise, in Register.com, Inc. v. Verio, Inc., supra, 126 F. Supp. 2d 238, and e Bay, Inc. v. Bidder's Edge, Inc., supra, 100 F. Supp. 2d 1058, the unauthorized search of, and retrieval of information from, another party's database was deemed to constitute trespass to chattel because the actions reduced the computer's capacity, slowing response times and reducing system [*52] performance.

Similarly, in Thrifty-Tel, Inc. v. Bezenek, supra, 46 Cal.App.4th at pages 1564-1566, the Court of Appeal found trespass to chattel where the perpetrators' computer program cracked the plaintiff telephone carrier's access and authorization codes, allowing long distance phone calls to be made without paying for them. That, too, impaired the operation and the value of the owner's possessory interest in the chattel.

In each of these cases, the chattel, or the possessory interest therein, was impaired as to its condition or value. n2

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n2 Nor is America Online, Inc. v. National Health Care Discount (N.D. Iowa 2000) 121 F. Supp. 2d 1255, 1278, cited by the majority, to the contrary since there, the defendant conceded that a prima facie case of trespass to chattel had been established. The only issue there was whether the defendant was liable for a third party's actions.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In contrast, here, the record does not suggest any impairment of the chattel's condition [*53] or value, or of the possessory interest therein.

Indeed, the extension of the tort of trespass to chattel to the circumstances here has been condemned by the academic literature. (Burk, The Trouble with Trespass (2000) 4 J. Small & Emerging Bus. L. 27, 39 ["the elements of common law trespass to chattels fit poorly in the context of cyberspace, and so the courts have been able to apply this claim to the problem of spam only by virtue of creative tailoring"]; Ballantine, Computer Network Trespasses: Solving New Problems with Old Solutions (2000) 57 Wash. & Lee L.Rev. 209, 248 ["Ultimately, failure to allege or to support a showing of actual harm should have precluded Intel from prevailing on a trespass to chattels theory"].)

Even in cases involving trespass to land, for which nominal damages may be sought (Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 676, 87 Cal. Rptr. 591), "'the rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion. . . .' [Citation.]" (San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal.4th 893, 936, 920 P.2d 669; emphasis added. [*54]) A fortiori, nondamaging electronic signals should not constitute trespass to chattel.

I acknowledge that the majority opinion contains a quote from an English treatise, Salmond and Heuston on the Law of Torts (21st ed. 1996) (Salmond), which states that "'trespass to chattels is actionable per se without any proof of actual damage," citing as examples the snatching of a customer's handbag for a few moments or the showing of a private letter to an unauthorized person. (Maj. opn. at p. 8, quoting Salmond, supra, § 6.2, p. 95.) But this proposition refers to the complete dispossession of chattel, which Prosser suggests satisfies the requirement of actual damage. (Prosser and Keeton on Torts, supra, § 14, p. 87.)

The majority also cites another English treatise, Clerk & Lindsell on Torts, that purportedly agrees with Salmond. But that treatise acknowledges that "it has been judicially asserted that even an intentional interference without asportation is not actionable unless some harm ensues" and simply states that textbook writers argue to the contrary. (Clerk & Lindsell on Torts (17th ed. 1995) Trespass § 13-159, p. 703.)

To the extent that Salmond and Clerk & Lindsell [*55] state an unqualified view that actual damage is not required to state a cause of action for trespass to chattels, this is the minority view and has been questioned. (See I Harper, James, Gray, The Law of Torts, § 2.3, p. 2:14 [citing cases supporting the proposition that absent dispossession, "there must be some physical harm to the chattel or to its possessor" and calling into question the contrary position by Salmond].)

In conclusion, the overwhelming weight of authority is that trespass to chattel requires injury to the chattel or to the possessor's legally protected interest in the chattel. Opening and reading unsolicited e-mails is not a cognizable injury to the chattel or to the owner's possessory interest in it. n3

----------Footnotes----------

n3 The majority cites to the U.S. Supreme Court's passing reference to a "form of trespass" in the context of unwanted mailings to householders in Rowan v. United States Post Office (1970) 397 U.S. 728, 737 25 L. Ed. 2d 736, 743, 90 S. Ct. 1484(Rowan). But the high court did not rule that an unwanted mailing constituted a trespass to chattel. "An opinion is not authority for a proposition not therein considered." (Ginns v. Savage (1964) 61 Cal.2d 520, 524, fn. 2, 39 Cal. Rptr. 377, 393 P.2d 689.) In Rowan, the Court rejected a First Amendment challenge to a federal statute that authorized a person to remove his name from mailing lists. The Court stated: "To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home." (397 U.S. at p. 737 25 L. Ed. 2d at p. 743. Nothing in Rowan suggests the common law, as opposed to a statute, can make unsolicited mailings a trespass to chattel.

----------End Footnotes----------

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C

One more issue remains to be addressed. If the transmittal of an unsolicited e-mail that causes no injury to the condition, value, or operation of the chattel (or to the possessory interest therein) does not rise to the level of trespass to chattel, should the requirement of injury be relaxed to allow an injunction against unwanted e-mail?

While the common law can be adapted to new circumstances, it is not infinitely malleable. Relaxation of the injury requirement would not merely adapt the tort, but change its nature. After all, "the property interest protected by the old action of trespass was that of possession; and this has continued to affect the character of the action." (Prosser and Keeton on Torts, supra, § 14, p. 87.) Dispensing with the requirement of injury to the value, operation, or condition of the chattel, or the possessory interest therein, would extend the tort's scope in a way that loses sight of its purpose.

"The reason that the tort of trespass to chattels requires some actual damage as a prima facie element, whereas damage is assumed where there is a trespass to real property, can be explained as follows: [P] 'The interest of a possessor [*57] of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection . . . for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor. Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected as stated in Clause (c). Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference.'" (CompuServe Incorporated v. Cyber Promotions, Inc., supra, 962 F. Supp. at p. 1023, citing Rest. 2d Torts, § 218, com. e, original italics.)

The injury claimed here -- the time spent reading an e-mail -- goes beyond [*58] anything associated with the chattel or within the tort's zone of protection. Extension of the tort to protect against undesired communications, where neither the chattel nor the possessory interest therein is injured, transforms a tort meant to protect possessory interests into one that merely attacks speech. Regardless of whether restraining e-mails to a private company implicates First Amendment rights, such a metamorphosis of the tort is better suited for deliberate legislative action than judicial policymaking.

Indeed, the Legislature has enacted two statutes that restrict the e-mailing of unsolicited advertising materials (Bus. & Prof. Code, §§ 17538.4, 17538.45) and another that affords a civil remedy to those who suffer damage or loss from, inter alia, the unauthorized access to a

computer system (Pen. Code, § 502, subd. (e)(1)). These statutory provisions and the Legislature's failure to extend these remedies to unsolicited e-mails in general suggests a deliberate decision by the Legislature not to reach the circumstances here. To be sure, common law claims can coexist with statutory [*59] enactments. Our Supreme Court has admonished that "statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject" (Rojo v. Kliger (1990) 52 Cal.3d 65, 80, 276 Cal. Rptr. 130, 801 P.2d 373; accord, City of Moorpark v. Superior Court (1998) 18 Cal.4th 1143, 1156, 959 P.2d 752.) But here Intel seeks not merely to invoke the common law, but to modify it in a way that alters the doctrine's very character in order to extend it where the Legislature has not yet gone. Modification of the tort doctrine in this way, which would affect the free flow of communication on the internet, is better addressed by the legislative branch, or at the very least by a more suitable tort doctrine that can distinguish between reasonable and unreasonable burdens.

As Learned Hand cautioned -- and this certainly applies when a court construes a common law doctrine that is embedded within a subsequent legislative enactment -- "the judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop, for he cannot [*60] tell the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern." (Hand, How Far is a Judge Free in Rendering a Decision? CBS radio broadcast, May 14, 1933, collected in Aldisert, The Spirit of Liberty, Papers and Addresses of Learned Hand (1952) p. 109.)

KOLKEY, J.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

JOHN P. SCRIPPS NEWSPAPERS,
d/b/a RECORD SEARCHLIGHT

Case 20-CA-24130

and

REDDING NEWSPAPER JOURNALIST
ASSOCIATION

Boren Chertkov of San Francisco, CA
for the General Counsel

Karyl Elinski of Seyfath, Shav, Fairweather &
Geraldson, of San Francisco, CA for the Respondent

DECISION

Statement of the Case

JAMES S. JENSON, Administrative Law Judge: I heard this case in Redding, California on April 7, 1992. The Complaint, which issued on September 26, 1991, alleges that on May 31, 1991, the Respondent promulgated, and has since maintained, a rule prohibiting employees from wearing union buttons stating Respondent is "unfair to employees" when the employees are dealing with the public both inside and outside Respondent's plant, thereby violating Section 8(a)(1) of the Act. The Respondent admits the promulgation of the prohibition, but claims that special circumstances justified the limitation on wearing the "unfair to employees" button, and as a consequence the prohibition was not unlawful. All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to file briefs. Briefs were filed by both the General Counsel, and Respondent and have been carefully considered.

On the entire record in the case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent, a California Corporation, is engaged in the publication, circulation and distribution of the Record Searchlight, a daily newspaper, in the Redding, California area. It is admitted and found that it annually derives gross revenues in excess of $250,000, holds membership in or subscribes

to various interstate news services, including Associated Press, has generated revenues from national advertising in excess of $10,000 and that at all times material herein was engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted and found that Redding Newspaper Journalist Association is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

1. The Facts

The facts are not in dispute. The Respondent publishes and distributes a daily newspaper in the Redding, California area. Robert Edkin is the editor and Bill Wagner is the managing editor who supervises the news gathering staff, handles all personnel matters and is the liaison between the Union and the Respondent. At all relevant times, the Redding Newspaper Journalist Association, herein referred to as RNJA, has represented the Respondent's 15 reporters, 4 photographers and 4 copy editors. The Respondent and RNJA were parties to a collective-bargaining agreement that expired on November 19, 1990. Negotiations for a succeeding agreement commenced in September 1990, were described as being "difficult from the beginning" and didn't end until November 1991. The current agreement is for a term commencing December 11, 1991 and ending December 10, 1993. The dispute in this case involves activities leading to the conclusion of the most recent negotiations which commenced, as noted above, in September 1990.

The record shows that in late December 1990, the reporters, photographers and copy editors commenced wearing white buttons 2 1/4 inches in diameter with the letters RNJA boldly printed across them in black.[1] They were distributed to all unit employees and were worn at all times, including working time when they were in contact with the public. They also prepared and displayed on their personal vehicles bumper stickers bearing the union logo, beneath which were the initials RNJA, and the message "RECORD SEARCHLIGHT UNFAIR TO EMPLOYEES". The personal vehicles, with bumper stickers attached, were used by employees while performing work assignments for Respondent and were also parked in Respondent's parking lot when they were at work in the plant. Employees were reimbursed for mileage and expenses for using their personal vehicles. At no time did the Respondent object to the wearing of the RNJA button or the display of the bumper sticker.

On Monday, April 29, 1991, the Union distributed to all unit employees another white button 2 1/4 inches in diameter bearing in black the legend "RECORD SEARCHLIGHT UNFAIR TO EMPLOYEES". It also bore the Union logo which consists of a drawing of a quill protruding from an ink bottle, and a camera.[2] The record shows these buttons were worn by unit employees at all times, including personal time, at Respondent's plant and on occasions when the employees came in contact with the public while gathering, reporting and photographing news.

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[1] A copy is reproduced on the Appendix attached hereto.
[2] A copy is reproduced on the Appendix attached hereto.

On May 3, 1991, managing editor Edkin, issued the following memorandum to each individual unit employee:

SUBJECT: Buttons

In the past day or so I have noticed several of you wearing buttons stating the Record Searchlight is "unfair to employees". If you wish to wear these buttons on the premises, you may do so. However, when you are on assignment outside the plant and dealing with the public, or dealing with the public inside the plant, you are doing so as representatives of the Record Searchlight.

We believe wearing this particular button is inappropriate for an employee representing the newspaper to the public. Accordingly, please consider this a directive not to wear the buttons in the situations described above.

If you wish to discuss this matter with me, please feel free to do so.

A handbook distributed to all employees contains the following guideline regarding appearance:

Your appearance should never embarrass your public contacts, your employer or yourself. Cleanliness, neatness and courtesy are the hallmarks of professional newspaper people.

The editorial department guidebook on appearance reads as follows:

You are the Record Searchlight's representative. In fact, most of the people you deal with view you as the Record Searchlight.

You should always look and act professionally. On holidays, Friday nights when the office is closed and during the dog days of summer, ties are not required.

Shorts, T-shirts, tank tops, dirty tennis shoes and general sloppy attire should be avoided. However, there are always exceptions depending on the time of year and the assignment you are on.

The record shows that after the memo was distributed, the unit employees refrained from wearing the "unfair" button while coming in contact with the public in the performance of their work, but continued to wear them at all other times. They also resumed wearing the RNJA button and continued to display, without restriction, the "RECORD SEARCHLIGHT UNFAIR TO EMPLOYEES" bumper stickers. The record shows further that unit employees traditionally picketed, without interference, in front of Respondent's plant from about 11:30 a.m. until 12:30 p.m. with a variety of messages such as "The Record Searchlight's Unfair", "Bob Edkin Cares More About Computers Than Employees", and "Flash: Working Conditions Wretched at the Searchlight." The dispute between Respondent and its employees received coverage in both the print media and on local television. The record also shows that a variety of buttons or badges unrelated to the instant labor dispute have been worn without objection on various occasions.

Bill Wagner, Respondent's managing editor, testified as follows regarding the reason for instituting the restriction on the "Unfair to Employees" button:

> Well, we found these buttons to be blatantly anti-Record Searchlight. We felt they tarnished the company's public image, and cut to the -- basically to the core of what we're all about, being impartial.
>
> * * * * *
>
> . . . the "Record Searchlight Unfair", they were anti-Record Searchlight buttons, they were not pro-union buttons. They don't even say RNJA on the button. I don't think anybody would know that they were a Union button. No one would know that that's a Union logo on the button . . .
>
> * * * * *
>
> Well, as I said, we felt that it tarnished our public image and the reporters and the photographers are our direct link to the public. The newspaper has basically its credibility, in that it's impartial, unbiased and accurate. And we felt that threatened, that image.
>
> * * * * *
>
> Oh, I think that the buttons were conspicuous, they were provocative and people would ask about the buttons, and they would be told what -- we assumed they would be told the buttons were about.
>
> It's difficult enough to get people oftentimes to talk or to consent to having their picture taken when reporters and photographers are doing their job. Oftentimes reporters have to get people off to the side maybe, especially on sensitive issues, and this could certainly lead rise to whether or not what was going to be produced was going to be impartial and accurate.
>
> The buttons were basically a statement against the Employer by the employee at the time they were representing the Employer. I know it sounds convoluted, and I -- it certainly would have to raise questions in the mind of the people being talked to.
>
> * * * * *
>
> We certainly hoped that it wouldn't [infringe upon the accuracy of the reporting], but I think that the people, the general public, the people that were being interviewed, that that question was raised in their mind, and certainly we thought it would have been raised and there were comments in that regard.

Discussion

The General Counsel contends the wearing of the union button is a fundamental right protected by Section 7 of the Act and that absent special circumstances, an employee who wears a union button at work is engaging in activity that is protected under Section 8(a)(1). The General Counsel further asserts that an employer who orders employees to remove union buttons because the employees have contact with the public violates Section 8(a)(1) because public contact is not sufficient basis to justify such a rule. The Respondent argues that an employer may limit the wearing of union buttons where, as here, there are special circumstances and it is narrowly tailored. It is argued that its desire to protect its "public image" constituted a "special circumstance" which justified the limitation on the wearing of the "Unfair to Employees" button. Stressing that a newspaper is an impartial news-gathering and news-reporting source, and that it must therefore maintain a balanced and neutral image in its reporting and must project a sense of integrity, it is argued the unfair button involved here carries with it two potential consequences: (1) ~~it~~ may call into question a reporter's or photographer's neutrality in reporting and/or investigating a news story and (2) as a natural consequence, it may call into question the newspaper's credibility and/or neutrality. It is argued that the button in question, which indicates clear anti-employer bias, may provoke antagonism or hostility against the reporter or newspaper and may cause a witness to be unwilling to talk to the reporter because the witness may view the reporter "as a zealot who lacks objectivity". Advertising his/her belief that the newspaper is "unfair", it is argued, may leave the witness doubting the reporter's willingness to cooperate with the newspaper's efforts to report the news with integrity, thereby imperiling the credibility and future of the paper. Therefore, it is claimed, the need to protect its public image, that of reporting the news in a neutral fashion, justifies the narrow limitation the Respondent drew on its employees' right to wear the "unfair" buttons.

In Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 (1945), the Court stated, "The right of employes to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity and . . . curtailment of that right is clearly violative of the Act". It is also well established that an employer may show that there are special circumstances which justify a ban or limitation on wearing union buttons. A determination as to whether an employer's action is lawful requires a balancing of the employer's interest in protecting his or her business against the employees' right to wear the union insignia.

In the present case, the wearing of the "Unfair to Employees" button was clearly connected to the union's position regarding its labor dispute with the Respondent over terms and conditions of employment, which, as the evidence shows, had been the subject of both newspaper and television coverage. The same message was displayed on the employees' vehicles used in business, and on picket signs outside Respondent's plant. Obviously, the ultimate purpose of the message was to extract a concession from the Respondent with respect to terms of employment. While such a message would reasonably be expected to discomfort one's employer, it is one commonly used as a means of persuasion by unions involved in disputes with employers. Such a message is, of course, directed to third parties not involved in the labor dispute. Having prohibited employees from wearing it when interacting with the public as Respondent's

representative, the issue become one of balancing the employees' Section 7 right to wear union emblems against the employers' right to operate its business, i.e, whether the employer is, by reason of special considerations, lawfully permitted to restrict the wearing of union buttons or emblems.

The Board has stated that employee efficiency, safety, plant discipline, customer relations and the employer's "public image" may constitute special considerations permitting an employer to prohibit wearing union insignia or buttons. See e.g. Albertson' Inc. 272 NLRB 866 at 866 (1984); United Parcel Service 195 NLRB 441 at 449 (1972). While most of the reported cases have involved broad bans against the wearing of union insignia, the Board has consistently recognized that one drawn narrowly may be appropriate. In my judgement that is the case here. The button criticizes the Respondent for "unfairness". Respondents rule prohibits the wearing of the UNFAIR TO EMPLOYEES button only when the employees are representing the Respondent in dealing with the public while on assignment outside the plant and when dealing with the public inside the plant. There was no limitation on their wearing the button at any other time, and the record shows they were in fact worn without objection both inside and outside the plant when not interacting with the public on Respondent's behalf. No limitation was placed on the wearing of any other union insignia, the display of the "Unfair" bumper stickers or the picketing activity in front of Respondent's plant. The only restriction, as noted, was while the employees were representing the Respondent when interacting with the public. In my view, the Respondent's concern over its neutrality image as a result of the public's reaction to the UNFAIR TO EMPLOYEES button justifies the narrow limitation it placed on wearing the button and qualifies as a special circumstance. Accordingly, it is found that the Respondent's right to prohibit wearing the button while its employees are interacting with the public on its behalf is superior to the employee's right to wear it at all times. I therefore recommend dismissal of the complaint.

Conclusions of Law

1. The Respondent is an employer engaged in commence within the meaning of Section 2(2), (6) and (7) of the Act.

2. RNJA is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusion of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated: June 30, 1992

James S. Jenson
Administrative Law Judge

APPENDIX

Redding, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JOHN P. SCRIPPS NEWSPAPERS,
d/b/a RECORD SEARCHLIGHT

and

Case 20-CA-24130

REDDING NEWSPAPER JOURNALIST
ASSOCIATION

ORDER

On June 30, 1992, Administrative Law Judge James S. Jenson of the National Labor Relations Board issued his Decision in the above-entitled proceeding and, on the same date, the proceeding was transferred to and continued before the Board in Washington, D.C. The Administrative Law Judge found that the Respondent had not engaged in certain unfair labor practices, and recommended that the complaint be dismissed.

No statement of exceptions having been filed with the Board, and the time allowed for such filing having expired,[1]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, and Section 102.48 of the National Labor Relations Board Rules and Regulations, the Board adopts the findings and conclusions of the Administrative Law Judge as contained in his Decision, and the recommended Order of the Administrative Law Judge becomes the Order of the Board. Accordingly,

The complaint is dismissed.

Dated, Washington, D.C., September 10, 1992.

By direction of the Board:

Joseph E. Moore

Deputy Executive Secretary

1 At the request of the General Counsel, the time for filing exceptions and brief was extended to August 27, 1992.